**Public Document** **No. 12**

The Commonwealth of Massachusetts

# REPORT

OF THE

# ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1934

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# The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 16, 1935.

*To the Honorable Senate and House of Representatives.*

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1934.

Very respectfully,

JOSEPH E. WARNER,
*Attorney General.*

# The Commonwealth of Massachusetts

## DEPARTMENT OF THE ATTORNEY GENERAL,

**State House.**

*Attorney General.*

JOSEPH E. WARNER.

*Assistants.*

ROGER CLAPP.
CHARLES F. LOVEJOY.
EDWARD T. SIMONEAU.
STEPHEN D. BACIGALUPO.
GEORGE B. LOURIE.
LOUIS H. SAWYER.[1]
EDWARD K. NASH.[1]
DAVID A. FOLEY.
SYBIL H. HOLMES.
JOHN LAURENCE HURLEY.[2]
JENNIE LOITMAN BARRON.[2]

*Chief Clerk.*

LOUIS H. FREESE.

*Cashier.*

HAROLD J. WELCH.

[1] Resigned December 31, 1933.
[2] Appointed January 1, 1934.

## STATEMENT OF APPROPRIATIONS AND EXPENDITURES

### For the Fiscal Year.

| | | |
|---|---|---|
| General appropriation for 1934 (St. 1934, c. 162) | | $91,567 00 |
| Balances brought forward from 1933 appropriation | | 619 05 |
| Appropriations for small claims: | | |
| St. 1934, c. 162 | $5,000 00 | |
| St. 1934, c. 384 | 1,000 00 | |
| | | 6,000 00 |
| Appropriations under St. 1931, c. 458: | | |
| St. 1934, c. 162 | $4,000 00 | |
| Extraordinary expense fund | 2,500 00 | |
| | | 6,500 00 |
| Advertising unclaimed savings bank deposits (St. 1934, c. 162) | | 15,000 00 |
| | | $119,686 05 |

*Expenditures.*

| | |
|---|---|
| For salary of Attorney General | $7,066 67 |
| For salaries of assistants | 37,558 31 |
| For salaries of all other employees | 19,596 73 |
| For sheriffs' fees, court stenographers, witness fees and all other special services | 7,754 12 |
| For law library | 726 47 |
| For office expenses and travel | 3,996 74 |
| For court expenses | 778 43 |
| For small claims | 5,910 74 |
| For claims under St. 1931, c. 458 | 5,143 00 |
| Total expenditures | $88,531 21 |
| Balance | $31,154 84 |

# The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 16, 1935.

*To the Honorable Senate and House of Representatives.*

Pursuant to the provisions of section 11 of chapter 12 of the General Laws (Tercentenary Edition), I herewith submit my report.

The cases requiring the attention of this Department during the year ending November 30, 1934, to the number of 8,510 are tabulated below:

| | | |
|---|---|---|
| Corporate franchise tax cases | | 2,458 |
| Extradition and interstate rendition | | 105 |
| Land Court petitions | | 51 |
| Land-damage cases arising from the taking of land: | | |
| Department of Public Works | | 466 |
| Department of Mental Diseases | | 2 |
| Department of Conservation | | 1 |
| Department of Correction | | 1 |
| Metropolitan District Commission | | 106 |
| Metropolitan District Water Supply Commission | | 44 |
| Miscellaneous cases | | 603 |
| Petitions for instructions under inheritance tax laws | | 52 |
| Public charitable trusts | | 318 |
| Settlement cases for support of persons in State hospitals | | 32 |
| All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth | | 4,217 |
| Indictments for murder, capital cases | | 54 |
| Disposed of | 42 | |
| Now pending | 12 | |

# THE DEPARTMENT OF THE ATTORNEY GENERAL.

## Its Functions in General.

### The Functions of the Office of Attorney General.

The legal service of the Department of the Attorney General embraces both criminal and civil functions.[1]

*a. With Respect to Administration of Criminal Matters.*

Criminal functions are involved by reason of provisions in several statutes requiring the Attorney General to take cognizance of all violations of law,[2] authorizing him to call upon the District Attorneys to perform services in criminal matters not required by law to be performed by the Attorney General personally,[3] and to proceed in certain criminal and other matters therein stated.[4]

*b. With Respect to Administration of Civil Matters.*

Civil functions are involved by reason of the recognized custom of three centuries, endowing the Attorney General with authority to represent the collective people in asserting or resisting encroachment upon their collective legal rights,[5] by reason of provisions in statutes,[6] in general, vesting him with the authority and duty of representing the Commonwealth in every legal transaction wherein it or its officials are a party[7] and wherein judges of the courts are named respondents;[8] in particular,[9] requiring the rendition of other services of wide nature; and, by reason of other statutes,[10] requiring him to serve upon certain boards in

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[1] Civil functions in the conduct of the legal matters of a government partake of the service of a Solicitor General, while, as in the Federal government, criminal functions are the service of the Attorney General. Mass. Const. art. 9, c. 2, § 1, provides for the office of Solicitor General, but the Legislature has not created it. The work of the office of the Attorney General in this State, therefore, fuses the services native to both offices, and is dominantly that of a Solicitor General.

[2] G. L. (Ter. Ed.) c. 12, § 10.

[3] G. L. (Ter. Ed.) c. 12, § 27.

[4] Several statutes relating principally to matters referred to him by departments.

[5] Seeking determination of the legal right to the exercise of office by rival officials and of use or appropriation of common public property by private individuals, or appearing in proceedings anywhere in matters affecting the welfare of the collective people.

[6] G. L. (Ter. Ed.) c. 12, § 3.

[7] The Legislature, however, in creating several departments, commissions and boards, has specifically provided that they may have legal counsel, presumably for the reason that the necessity for instant advice, to enable rendition of service to the people in the multitude of matters under their jurisdiction, as a practical matter precludes resort to the office of the Attorney General for sanction of every transaction. The Attorney General, however, advises and represents such departments in matters affecting any department as a whole.

[8] Embracing every form of litigation in the State and Federal courts; approval of the legal form of every document, contract, lease, release, bond, rule and regulation of the twenty departments; approval of titles to land taken by eminent domain or purchase; and the rendition of opinions to the Legislature and its committees, and to such departments and officials.

[9] Approval of all by-laws enacted by towns; approval of accounts of public administrators — in that for lack of heirs unexpended balances escheat to the Commonwealth; suits in behalf of cities and towns against collectors and bondsmen for uncollected taxes or for taxes collected and unaccounted for; application of charitable trusts to purposes of donors; settlement of claims under $1,000 against the Commonwealth where the claimant has no remedy at law; investigation of matters specially ordered by the Legislature; determination of the form of questions appearing upon the ballot and of initiatives and referenda.

[10] Such as boards determining existence of emergency in municipalities to enable expenditures in excess of statutory limits; supervising the administration of certain towns; grading of milk, etc.

an administrative or quasi-judicial capacity and to make recommendations[1] for amendment to and proper and economical administration of the laws.

## I. Administration of Criminal Matters.

### 1. Aspect of Criminal Matters to which Administration Applies.

Crime is violation of Federal, State and municipal laws. Its suppression and control, apart from private agencies, are subject to Federal and State agencies, each several in number. In this Commonwealth the agencies are those for prevention, detection, apprehension, prosecution and, upon conviction, correction of criminals. The first are agencies, public and private, such as the police, probation officers and welfare agencies; the second and third are the police, State and municipal; the fourth are the police and attorneys for complainants in the district courts and the Attorney General and the District Attorneys in the Superior Court; and the fifth are the court, probation officers and welfare agencies.

It will be seen that before prosecuting agencies may begin prosecution, the agencies for prevention, detection and apprehension must perform their responsibilities.[2] In general, they are of two groups, State and municipal. The former is composed of the State Police and the Metropolitan District Police; the latter, of 355 separate autonomous police departments numbering some 11,000 men, with efficacy over local crimes to such extent as their equipment, personnel and efficiency permit and as public desire for law enforcement impels. Neither the Attorney General nor a District Attorney nor any person in the State government has direction or control over them, although in some quarters the contrary is erroneously assumed, and it is also erroneously assumed that the Attorney General and the District Attorneys are chargeable with responsibility for the preservation of the public peace as well as prosecutions for its breach everywhere.[3]

### 2. Prosecution of Crime is the General Aspect to which Administration Applies.

The only relation which the Attorney General and the District Attorneys have with the suppression of crime is its prosecution.

Prosecution of crime is had in the district courts where misdemeanors principally are prosecuted, and in the Superior Court where felonies and appealed misdemeanors are prosecuted.

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[1] G. L. (Ter. Ed.) c. 12, § 11.

[2] With respect to rampancy of crime by persons unknown, and of unsolved murders, it is obvious that neither the Attorney General nor the District Attorneys have any responsibility; that it is entirely the responsibility of the police.

[3] It is asserted, for instance, that the authority given to the Attorney General to call a special grand jury (G. L. (Ter. Ed.) c. 277, § 2A) charges him with responsibility for prevalence of crime anywhere unsuppressed by local police, — such as lotteries, horse-room pools, slot machines, bootlegging and gaming, — in that it endows him with power to summon members of a community before it to extract from them evidence as to violations of law. The facts are that a special grand jury has no more efficacy than a regular grand jury; that there is no excuse for requesting a special grand jury if a regular grand jury is available; that a special grand jury may not be summoned, even if requested, unless the Chief Justice of the Superior Court certify that "public necessity" requires it; that, unless evidence has been obtained for presentation to it, the request for a special grand jury to further an attempt to ferret evidence out of members of a community in the hope of discovering somebody against whom an indictment can be found for something is unjustified; that the purpose of a special grand jury is to enable, in an emergency, despatch in the presentation of indictments when exigencies preclude resort to a regular grand jury; that, otherwise, the application for a sitting of a special grand jury is a spectacular gesture and cannot serve as a control of crime in substitution for direct control by the police.

3. Of Such Aspect, Prosecution in the Superior Court is its Scope.

In so far, therefore, as the Attorney General[1] and the District Attorneys have to do with the matter of crime, it will be seen that they have no responsibility to detect and apprehend criminals and no authority over the police, municipal or State, in their responsibility to detect and apprehend criminals and to maintain the public peace, other than to bring to the attention of such police officials any crimes of which they are cognizant; that their responsibility is to prosecute crime; that they have no duty or responsibility to prosecute the class of crimes presentable in the district courts, except capital offences, and that their responsibility is confined to the Superior Court in the preparation and presentation of cases of alleged felonies and of misdemeanors appealed from the district courts. To such extent, therefore, as prevalence of crime is attributable to lack of fear of detection and arrest, it remains the problem of perfecting the agency of the police; to such extent as prevalence is attributable to lack of fear of successful prosecution in the district courts, it remains the problem of perfecting prosecution there.

4. Modes of Administration to Effect Prosecutions: by Co-operative Action with District Attorneys; by Action of the Attorney General Independently.

Administration is effected by co-operative action with the District Attorneys in prosecution of matters wherein statutes authorize the Attorney General to call upon any District Attorney or by independent action of the Attorney General to prosecute, wherein the statutes enable or exact such independent prosecution.

(1) Administration by Co-operative Action with District Attorneys.

All violations of law arising in the district of any District Attorney, when brought to the attention of the Attorney General, are, as a matter of routine, referred to the District Attorney for prosecution, as the statutes provide that the District Attorney shall appear for the Commonwealth in all cases unless the Attorney General interchange such duties and unless personally present.

Although the Attorney General[2] may at any time assume personal control of any criminal proceedings undertaken by a District Attorney, it is not, and never has been, the custom for him to do so, for many reasons.[3]

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[1] I have repeatedly called to the attention of the Legislature the fact that the Department of the Attorney General has no facilities whatever for investigation and expense of prosecution of general crime, and to the fact that it is entirely dependent upon the Department of Public Safety for assistance; that such department is not in the slightest degree obligated to render such assistance; that such assistance as it may render is dependent upon exigencies of its routine business and extent of appropriations, and that the Attorney General has no jurisdiction with respect to extermination of local criminal prevalence. The Legislature has repeatedly denied the Attorney General facilities, jurisdiction and appropriations.

[2] G. L. (Ter. Ed.) c. 12, § 27.

[3] As the Legislature has divided the Commonwealth into eight districts (G. L. (Ter. Ed.) c. 12, § 12) for prosecution in the Superior Court of crimes occurring in each district, and has created the office of District Attorney, with Assistant District Attorneys in each district, and as, primarily, the duty of a District Attorney is solely prosecution; as any general assumption by the Attorney General of prosecutions in criminal matters throughout the Commonwealth would unnecessarily duplicate the work of the District Attorneys; as the Attorney General's Department is charged with responsibility for all civil legal work of the Commonwealth; as any venture on the part of the Attorney General to assume personal charge of such criminal matters would result in corresponding inattention to civil matters; as assumption of personal prosecution of any matter logically within the jurisdiction of a District Attorney would occa-

*a. Conferences with District Attorneys and Assistant District Attorneys.*

Pursuant to a program adopted during my incumbency, I have held conferences with the District Attorneys[1] and their Assistants every ninety days, with prime purpose, not only of furthering co-operation, but of attaining quick prosecution as soon as arrests are made, to the end that in so far as it has been contended that swift justice is a potent deterrent to crime, it may not truthfully be said that any prevalence of crime in Massachusetts is, in the slightest degree, attributable to delay by the District Attorneys or the Attorney General in prosecution after arrest, nor to such congestion of the criminal dockets as would force District Attorneys to bargain with defendants for lighter terms, for easy riddance of accumulated cases. In consequence of persistence in this program, we have demonstrated, in instance after instance, that conviction for heinous crime was but a matter of days after commission and arrest; that dockets are now so cleared that, in general, all triable cases are currently reached and disposed of;[2] and, upon the statistics of number of arrests, as index that general crime has decreased.[3] The record of the District Attorneys with respect to attainment of these results is indisputable, and in so far as crime control is effected by immediate prosecution after arrest, is unassail-

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sion unjustified reflection upon the capacity of the District Attorney (see Crime Commission Report Senate 125, 1934, p. 114, to same effect); and as the Legislature has declined, by appropriation or otherwise, to provide facilities for such general assumption of such prosecution by the Department of the Attorney General, it has been the practice that prosecution of all matters, other than capital cases up to twenty years ago, and matters solely chargeable to the Attorney General, should be had by the District Attorneys, and not by the Attorney General personally. Twenty years ago, by custom, the Attorney General conducted all murder trials. Since that time the great mass of civil legal business of the State has so increased as to exact all his attention, and as the District Attorneys, elected by the people, have demonstrated their capacity to prosecute such cases, the practice of such prosecution by the Attorney General has been abandoned. It was also a contemporaneous procedure for capital cases to be heard by three judges of the Superior Court. As such procedure was changed, by reason of exigencies precluding the use of three judges, similarly the custom of prosecution of such cases by the Attorney General was abandoned. Indeed, the resumption of such custom in any or all cases would cause comment as to the competency of a District Attorney to conduct them, and, also, unless resumed in all capital cases, its resumption in some and not in others would cause comment. At the present time there are thirteen capital cases pending. It is obvious, if there be expectation, by reason of that custom, that the Attorney General should conduct all murder cases, that not only would his entire time be consumed in such prosecution, to the exclusion of the innumerable civil matters entirely dependent upon him for decision and action, but that, in order to arrange for these trials in sequence, delay in the disposition of the capital cases would ensue.

[1] G. L. (Ter. Ed.) c. 12, § 6.

[2] In 1933, 19,931 cases were handled; in 1934, 20,447. There was an increase of 672 cases of drunkenness.

[3] Eliminating drunkenness, there were 5,180, or 6.7 per cent, fewer arrests in 1934 than in 1933; for drunkenness, 83,658 arrests in 1934, 67,096 in 1933, an increase of 16,562, or 24.7 per cent; a total of 155,335 arrests in 1934; of 143,953 in 1933; an increase of 11,382, or 7.9 per cent, in 1934.

For offences against the person, 5,846 arrests in 1934, 6,202 in 1933, a decrease of 5.7 per cent. For robbery, 16.4 per cent decrease in arrests.

For offences against property, 11,824 arrests in 1934, 12,289 in 1933, a decrease of 3.8 per cent.

For offences against public order (including drunkenness), 137,665 in 1934, 125,462 in 1933, an increase of 21.4 per cent in nonsupport cases; decrease of 53 per cent in violations of the liquor laws; decrease of 9.4 per cent in violations of the motor vehicle laws; decrease of 24.4 per cent in sex offences (excluding those classed under offences against the person).

Mr. Frank Loveland, Director of Research for Prevention of Crime in the Department of Correction, to whom I am indebted for compilation of these statistics, and to whom I express my appreciation for his intelligent service in criminal statistics, says: "If statistics on arrest are any indication of crimes committed the comparison for 1933 and 1934 indicates a gradual decline in the commission of the more serious offences, or those against the person and property, and a significant increase in drunkenness, violation of the gaming and lottery laws and nonsupport."

This compilation is appended.

able and, indeed, unsurpassed by any comparable State. The standard will undoubtedly be maintained. This record is an accomplishment for which each and every District Attorney and his staff is entitled to great credit, and one achieved during my administration of criminal justice, which is a source of great personal pride. However much or little comment be appropriate as to delay of justice in trials in civil actions, it is not pertinent to trials in criminal actions.

*b. Reports of District Attorneys as to Administration in Each District.*[1]

For Middlesex, Mr. Bishop reports that of cases against 653 persons charged with felony and against 910 persons charged with misdemeanors, not more than 25 for felony and 89 for misdemeanors will remain undisposed of December 31, 1934, including 3 first-degree murder cases.[2]

For Essex, Mr. Cregg reports that the dockets are clear, as usual; that the cost of administration this year was the lowest in fifteen years; and that most unusual incidents occurred in some trials.[3]

For the four southern counties, Mr. Crossley reports that, in Bristol, 137 cases,[4] including 1 murder,[5] pending, and 494 felonies and 740 misdemeanors were disposed of; in Barnstable, 10 cases pending, and 33 felonies, including 1 murder,[6] and 132 misdemeanors disposed of; in Dukes County, 1 case pending, and 5 felonies and 5 misdemeanors disposed of; and in Nantucket, no cases pending, and 5 felonies and 5 misdemeanors disposed of.

For Norfolk and Plymouth, Mr. Dewing reports that, in Norfolk, of 109 pending felonies, including 3 murder indictments, 21 have been tried, and of 155 misdemeanors, 78 have been tried, and that a succeeding sitting will dispose of the others[7] (a commendable condition of the docket, considering the interruption to routine spring business caused by his long and able trial of the Millen cases, of such consequence to the people); that, in Plymouth County, of 39 felonies and 35 misdemeanors, all have been disposed of. He observes an increase in manslaughter cases resulting from operation of motor vehicles and in appealed "pool" operations. He urges insistence, in the Superior Court, upon the same sentence imposed by a lower court, as one effective means of curbing pool rackets, and advocates publicity to warn the people against a new form of racket — the oil royalties racket.

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[1] Northern District (Middlesex), Warren L. Bishop.
Eastern District (Essex), Hugh A. Cregg.
Southern District (Nantucket, Dukes County, Bristol and Barnstable), William C. Crossley.
Southeastern District (Norfolk and Plymouth), Edmund R. Dewing.
Middle District (Worcester), Edwin G. Norman.
Western District (Hampshire and Franklin), Joseph T. Bartlett.
Suffolk District, William J. Foley.

[2] No. 12734 (Walsh), No. 12324 (Penta, Ventura, Orlando, DeVito), and No. 12323 (Taylor).

[3] One, which is perhaps without precedent in the country, was in the trial of two men, liable to extreme penalties, during the course of which District Attorney Cregg discovered evidence refuting evidence prejudicial to them previously given to him, and upon his own initiative and pursuant to the ideals of true prosecution, moved for their discharge, thus exemplifying the Massachusetts ideal of justice, as equally quick to protect private rights as to avenge public wrongs.

[4] 22 with defendants unapprehended; 13 defaulted.

[5] Indictment for second-degree murder (DiCiccio) for trial February, 1935.

[6] On indictment for murder (Kari) plea of manslaughter accepted, with sentence of 7 to 10 years in State Prison.

[7] Though by the December, 1934, sitting, 61 additional felonies and 105 appealed misdemeanors were brought in, only 6 felonies, including a murder indictment set for trial in January, and but a few misdemeanors, are undisposed of.

For Worcester, Mr. Norman reports all triable cases (1,132) disposed of,[1] including 6 first-degree murders.

For Hampden and Hampshire, Mr. Moriarty reports that the dockets in both counties permit immediate trial of any case that may arise; that, in Hampden, 4 murder trials were disposed of, and that all misdemeanors were disposed of at a special sitting; and that there were no acquittals in crimes of force and violence.

For Hampshire and Franklin, Mr. Bartlett reports that all triable cases were disposed of; that in Hampshire, only 7 felonies[2] and 3 misdemeanors[3] are pending; that, in Franklin, although 7 felonies[4] are pending, there are no triable felonies, and only 5 misdemeanors;[5] 1 homicide[6] disposed of, and 1 murder as yet unsolved.

For Suffolk, Mr. Foley reports that the number of untried and undisposed of cases is the lowest in years; that there are 3 capital cases for trial,[7] and that successful prosecutions have had most salutary effects.[8]

*c. Indictments for Capital Crime and Their Disposition.*

The record and status of indictments for capital crime reported to the Attorney General under the statute[9] is appended.

(2) Administration by Action of the Attorney General Independent of the District Attorneys.

The criminal matters with which the Attorney General deals primarily are recited in the statutes,[10] chiefly, violations of laws reported to him by the head of any department having jurisdiction over the administration of such laws.

*a. Action relating to General and Particular Violations of Law.*

To recount the incidents of such independent action taken by the Attorney General in such matters, pursuant to the dictates of such statutes, is obviously impossible. In so far as independent action in criminal matters is invoked by the general statutes providing that he shall take cognizance of all violations of law, every complaint anywhere was immediately referred for investigation and arrest to the Department of Public Safety, the only agency the Attorney General may utilize, and, if the evidence so warranted, prosecutions followed. In crime of great public con-

[1] 17 cases were disposed of under the recent law (G. L. (Ter. Ed.) c. 263, § 4A, added by St. 1934, c. 358) enabling arraignment of persons charged with crime not punishable by death, upon waiving of indictment by a grand jury; in the murder cases, 3 were found not guilty, 2 by reason of insanity and 1 found guilty of manslaughter.

[2] 2 companion cases for armed robbery; 3 companion cases for arson, where all defendants are serving sentences for other crimes; 2 cases where defendants have already pleaded guilty and await sentence.

[3] 2 for liquor, 1 for vagrancy.

[4] 5 against the same defendant, with pleas, continued for sentence; 1 plea of guilty, but defendant serving sentence for another crime; and 1 in the Supreme Judicial Court.

[5] Ready for trial, 3 entered since last sitting of court.

[6] James Suriano, Hampshire (indicted for murder, tried for second-degree, plea of manslaughter accepted during trial).

[7] 1 case tried, but jury disagreed; in second, indictment returned in 1924, but prisoner returned to this jurisdiction only five months ago; and in third, indictment returned in 1933, but prisoner not apprehended until November of this year.

[8] Prosecution for jury bribing, with State Prison sentence; for arson, highly commended by the State Fire Marshal.

[9] G. L. (Ter. Ed.) c. 212, § 7.

[10] The Department of Public Utilities, violations of the Sale of Securities Act; the Commissioner of Banks, of banking; the Commissioner of Insurance, of insurance; the Secretary of State, of corrupt practices; the Governor and Council, relating to parole, pardons, extradition of fugitives; and custodians, with respect to habeas corpus proceedings.

cern, during search for defendants, the Attorney General was in constant contact with the Department of Public Safety and its most efficient detective and police units,[1] — upon which the Attorney General is obliged to depend,[2] — and, during trial, with the prosecuting District Attorney, to extend such instant supplementary aid in furthering and securing conviction as contingencies might require. In furtherance of the Federal campaign against crime, the Attorney General was among the first to extend to the Attorney General of the United States his offer of every facility at his disposal.

*b. Action relating to Violations of Banking Laws.*

Among the particular criminal matters, with the conduct and prosecution of which the Attorney General is primarily concerned, those relating to the status of violations of banking laws were paramount.[3]

Some of these were violations of Federal law, and the Attorney General co-operated in their prosecution by the Department of Justice. One of the other

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[1] I gratefully acknowledge the splendid services of John Stokes and Joseph Ferrari.

[2] As the Legislature, through lack of legislation and lack of appropriation, has denied the Attorney General other facilities.

[3] Under the statute, which required prosecution forthwith, the particular matters in three banks upon which the Commissioner of Banks, in 1932, reported specifically, were immediately referred to the appropriate District Attorneys; the Medford Trust Company, to District Attorney Bishop; the Industrial Trust Company, to District Attorney Foley; and the Salem Trust Company, to District Attorney Cregg. Prosecutions followed.

There were matters in the data not specifically reported, the determination of the nature of which became contingent upon necessary further investigation, relating to other banks, particularly closed banks in the Federal National Bank chain. After their determination, any contemplated action had to regard three considerations, namely, maintenance of confidence in banks which had not been closed — which might be shattered by precipitate action against officers of closed banks; recovery, as far as possible, for depositors, of their moneys which had been dissipated; and prosecution to secure punishment of those responsible for the predicament.

Maintenance of confidence in solvent banks was imperative; restoration to depositors of their losses in closed banks by civil and administrative action was of no less vital social and economic importance than prosecution; and prosecution was essential though incapable of effecting the restitution of a dollar. The vast volume of data, affecting all the transactions in the various banks, required such examination, for determination of their criminal and civil aspects, for assembling of facts, for maintenance of civil suits, and for prosecution in each case, as to preclude the possibility of precipitate criminal action. This process thus satisfied the first consideration — maintenance of public confidence in solvent banks, and enabled the second — substantial restoration to depositors in closed banks and their reorganization and reopening — by civil proceedings, by administrative action of the Commissioner of Banks through liquidating processes, resort to supplementary financial measures and institution of civil suits.

In 23 banks, with 350,000 depositors and $108,000,000 deposits, during a two-year period, over 50 per cent — $63,195,000 — has been returned (and $5,645,000 additional will be payable in December, 1934).

Of the relative salutary merits in each of the three considerations, the conduct and service of the Attorney General contributed to the consummation of the first two, — confidence in solvent banks and substantial restoration to the depositors in closed banks. With respect to the third — prosecution — obviously all alleged violations of State banking laws by any one of the banks in the Federal National chain, involved transactions by such bank with some other bank or banks in the same chain, and presented a composite problem not to be met successfully by isolated State proceedings. Obviously, also, they involved transactions with the parent Federal Bank, which made the problem more composite, since the parent bank was a Federal Bank, and it was not within the jurisdiction of this Commonwealth to investigate or supervise its alleged operations. The Federal Department of Justice met the impasse to successful State prosecution of all these integral matters by instituting, in 1932, prosecutions of those in the Federal Bank. In deference to the request of the United States Special Assistant Attorney General in charge of the Federal prosecution, as well as to practical considerations, and to the end that such prosecution might not be deterred by simultaneous and scattered prosecutions of separated matters in different districts, which would occasion use of much of the same evidence, and that, in all the civil proceedings for recovery of money for the depositors, data might be immediately accessible, all active criminal prosecutions by the State were allayed.

To such extent as consideration and determination of these matters by the Federal Department was a factor, their recent conclusion no longer interposes such proceedings by the State as the experience there may support.

violations was successfully prosecuted by the office of the Attorney General, with penalty heavier than had ever been previously imposed anywhere in the State for violation of our banking laws.[1]

*c. Extradition.*

There were 105 extradition cases; 25 requests from other States, to which 17 fugitives were returned; 84 requests from this State to other States, from which 79 were returned, including 32 charged with desertion, non-support or neglect of wife and children.

### 5. General Observations upon Criminal Matters.

The population of this State is 4,249,614. Though the agencies for community peace and capture of criminals are now separated into independent units, the very fact that the lives and property of such myriads are safeguarded speaks great praise of our police, State and municipal, — the first line of defence. My esteem for their courage and fidelity has been increased from experience during my tenure, and will excite constant response to measures for greater justice to them and to their dependents. The fact that general crime is decreasing and that vicious crime is factional speaks laudation of the general disposition of Massachusetts to law observance.

Crime and measures for its more effective control are subjects of no less major importance than economics, though minor in public interest. Just as, in matters of health, though it may peril the whole race, crusades against contagion commandeer only those who have suffered its scourge; so, crusades against crime recruit only those racked by its ravage. Though, in 1934, decimation by driven death censused the population of Florida, Rowe and Otis combined, highway safety campaigns can enlist only the corps of the careful, so crime control can enroll only the contingent of the dutiful, notwithstanding the blare of banditry, bank robbery and bribery.

That such phenomenon exists is not the fault of the people. It tokens the tragic truism, "What's everybody's business is nobody's." It exists because of the complexity of the subject of crime and its control — too great for casual comprehension; because of the variety of its aspects — too numerous for random understanding; because of futility of complete effective control by reform in one aspect without accompanying reform in others; because of frequent defeat of ideal proposals; because of the bitter controversies which any proposal evokes,[2] however ideal;

[1] *Industrial Bank and Trust Company.* — Trial July, 1934. Indictments for violation of banking laws and G. L. (Ter. Ed.) c. 266, § 74, for wilful and unauthorized use by an officer of this corporation of its name to obtain money upon its credit for his own use or benefit; defendants found guilty; sentenced to 1 year in common jail and a fine of $2,000 and sentence of additional year in the former; and sentence to State Prison for 3 to 5 years in the latter. Several indictments are still pending. The company was closed March 19, 1931, with 13,923 savings accounts of modest amounts aggregating $1,626,139, and 1,314 accounts of the small business man subject to check, aggregating $653,861, which, it appeared, had been affected by the conduct of the persons convicted.

[2] For instance, the suggestions and recommendations of the Special Crime Commission (Senate No 125, 1934) dealing principally with the agencies of detection and apprehension, of prosecution and of correction, because of opposition to each were, in the main, all rejected. The nature of some of its suggestions was as follows:

With respect to detection and apprehension, centralization of all police departments under State control.

With respect to prosecution, appointment of the Attorney General by the Governor; confinement of the Attorney General to criminal matters; possible appointment of District Attorneys by the Governor; appointment of a public prosecutor in the office of the Attorney General; elimination of the grand jury in certain cases, if not entirely; division of the district courts into four circuits; curtailment of appeals from district to Superior Court.

With respect to correction, a more discriminate mode in the selection of probation officers; a Statewide system of probation; a more discriminating mode in selection and service of jurors.

because of large concern for crimes of violence and little for vice, — like lotteries and slot machines, though both are forbidden; and because criminal conduct cannot be corrected while, in civil conduct, injustices of greatest proportions continue uncorrected. Endeavor for more effective control should persist, though the moral aspects enlist, as has been demonstrated, the active interest of but a fraction. The economic and social aspects have tremendous relation to restoration of industry and employment, to utilization of wealth for legitimate service to society, and to the hastening of the new order for social justice — more dependent for its establishment upon the exemplification of honest and equitable principles than legislative prescription.

Consequently, progress toward more effective control will be slow. It will require patience and will depend largely upon the incentive of public opinion,[1] but no realm offers greater opportunity for social service.

The status of crime and the effectiveness of its control in the United States are not comparable[2] to any other country, though writers, to our disparagement, would so represent. Status of crime and effectiveness of control is affected by our dual system of government, the Federal and that of forty-eight sovereign States. Not only do these separated jurisdictions complicate control of crime, but every trial for a State crime is complicated by questions which a defendant may raise under two Constitutions, the Federal and the State. Recently, Congress not only strengthened control over crime against the Federal government, but, by conferences[3] and otherwise, furthered co-operation between States and between States

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[1] For instance, so long as, in any community, it is not generally considered unjust that legitimate tax-paying business struggles to exist, while illegitimate business of selling slot machines and gambling devices flourishes; so long as it is not generally considered an economic waste, in the wanton diversion of money from patronage of legitimate business, to allow absentees to drain it of the earnings of its workers; so long as it is not considered gross class privilege to let unmolested gambling-slot-machine interests "short change" victims in a deal of one chance in nine hundred, while honest merchants are kept under espionage; so long as it is not considered socially harmful to an individual to throw away wages needed for subsistence in patronizing pool rackets that gyp 549 out of every 550, — just so long will there be no incentive whatever to suppress this form of vice. (See Crime Commission Report (Senate, No. 125, 1934), pp. 88–95.)

[2] For instance, the area of Great Britain is not larger than New England, New York State and part of New Jersey, and the population of the Dominion of Canada is not twice that of Massachusetts alone.

[3] At the National Crime Conference in Washington, to be held December 10–13, the Attorney General will be represented by Assistant Attorney General Jennie Loitman Barron, for presentation, in his behalf, of the following resolution:

"*Whereas*, In many jurisdictions in many States, the control over criminal conditions, and the capture and arrest of criminals is local and exclusive; and

"*Whereas*, It is necessary to combat lawlessness and organized dangerous banditry, and to capture and arrest the criminal, either in the act or in the flight; be it

"*Resolved*, That this National Conference on Crime call the attention of the various police agencies throughout the several States to the necessity for the creation of an administrative police agency within each State, systematizing all police departments so that there may be a co-ordination of all police activities, town, city, county and State; that said co-ordination, while preserving the identity and autonomy in local administration, will at the same time enable their co-operation with the State and with each other, for common action and defence against organized crime; be it further

"*Resolved*, That in pursuance of said recommendation, this National Conference on Crime recommend the following as a means for enabling co-ordinative and contemporaneous action by all police agencies:

"1. That there be a standing Grand Police Council, consisting of the head of every police agency in the State, the Chairman to be designated by the Governor, to meet at such times as called together by an Advisory Commission, for consultation and for discussion on matters relating to crime.

"2. That there be an Advisory Commission on Police Affairs of five persons, the chairman to be designated by the Governor, one member to be the Commissioner of Public Safety, four members to be appointed by the Governor, of whom three shall be responsible officers of police departments of any city or town in the State.

and the United States. There has been real progress, then, by bettering this instance of ineffectiveness of crime control.

But major responsibility for the control of crime must always remain that of a State. This means, therefore, that to secure greater effectiveness, the effectiveness of the agencies responsible for such control, namely, the agencies for prevention of crime and for detection, apprehension, prosecution and correction of criminals, must be perfected. Each agency has a whole category of aspects, and therefore our only hope for achievement must depend ultimately upon the intensive and intelligent efforts and proposals of persons devoted to problems peculiar to each agency and upon the conjoint labors of all. Thus, the first invokes the church, school, press, medicine, recreational and vocational units, and youth movements; the second and third, the police; the fourth, the bar; and the fifth, the penologist and psychiatrist.

Already we have many studies and suggestions. However perfect the measures for prosecution and correction may be, they do not function until after commission of crime and detection and apprehension of the criminal. Moreover, estimating the relative force of each, it appears that fear of detection and capture, rather than of prosecution and conviction, is the greatest deterrent to crime. The list of banditries, holdups, robberies and of escapes through systematized and organized action is daily mounting. Consequently, if not for other reasons, measures to perfect these agencies have rightful precedence in any program.

I later recommend legislation for perfecting these agencies and others.

Malevolence is never mitigated by meagre measures, but, in the final analysis, no amount of legislation may lave the land of malevolence. Nor, in my opinion, is poverty prone to pravity, for I have observed more probity in the poor than in the opulent. The ultimate of benevolence in life is the regenerative power of spiritual precept in individual life.

## II. Administration of Civil Matters.

In brief, this service is legal or administrative and applies to every legal civil matter of whatever nature, transacted by any officer of the Commonwealth or wherein the Commonwealth is an interested party, or wherein the rights of the collective people are affected, and applies to matters of varying nature recited in statutes and resolves, for administration by the Attorney General. This service entailed 8,510 matters.

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"That this Commission have power —

"1. To call meetings of the Grand Council of Police for advice and consultation.

"2. To recommend definite measures relating —

"(*a*) To adoption of uniform practices and of approved practices in any particular community.

"(*b*) To establishment of police schools.

"(*c*) To creation and use of a central service for identification of criminals, and dissemination of important information to all police departments to enable immediate concerted action.

"(*d*) To installation of devices and methods for detection and apprehension of criminals, and of gunmen and racketeers in particular.

"(*e*) To use of any department to aid another or the Commission.

"(*f*) To aiding smaller communities in the event such be without an established police force.

"(*g*) To ascertainment of all facts in event of occurrence of serious crime and of escape of the criminal undetected.

"(*h*) To formulation of methods whereby co-ordinated and co-operative activities may be conducted simultaneously by police departments of the now separate towns and separate cities.

"3. To report to the Governor yearly."

1. Services in Legal Matters Occasioning Litigation in the Courts.

"Cases tried, argued or conducted." [1]

A. Cases Decided During the Year.

(1) *In the Federal Courts.*

(*a*) *United States Supreme Court.*

There were two cases. [2]

(*b*) *United States Circuit Court of Appeals.*

One tax case; [3] the Commonwealth was sustained.

(*c*) *United States District Court.*

Two bills in equity and two petitions for habeas corpus; [4] all dismissed.

(2) *In the State Courts.*

(*a*) *Supreme Judicial Court.*

There were 8 cases; [5] 15 petitions for habeas corpus; the Commonwealth sustained in all. Five cases related to taxes and one to constitutionality. In 7 writs

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[1] G. L. (Ter. Ed.) c. 12, § 11.

[2] *Downey and Gallegher* v. *Hale*, 291 U. S. 662. *Ex parte* Poresky, 290 U. S. 30, petition for writ of mandamus dismissed; constitutionality of compulsory automobile insurance law sustained.

[3] *Commonwealth* v. *Trustee in Bankruptcy of E. E. Gray Co.* That a corporation which did business throughout one year was subject to the Massachusetts corporation excise tax, although it ceased to do business and was petitioned into bankruptcy prior to the date in the following year when the tax was assessable; and that such tax was provable in bankruptcy.

[4] For release from State Prison; against the Governor and the Attorney General.

[5] *Brady* v. *Henry F. Long*, Mass. Adv. Sh. (1934) 201. That petitioner for a refund under G. L. (Ter. Ed.) c. 64A, § 7, of part of gasoline taxes which he had paid was not entitled to a refund for such portion as had not been used on the highways of the Commonwealth, where the petitioner could not show with accuracy what portion was so used.

*Newton Building Company* v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1934) 417. That a corporation may not deduct as real estate in determining its corporate excess for purposes of the excise tax the value of a leasehold interest held by it in land in another State.

*Sayles* v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1934) 625. That refunds paid by corporations to holders of bonds, under a covenant to reimburse the holder for Massachusetts income taxes on the interest from the bonds, is taxable as interest.

*Trustees of Boston University* v. *Commonwealth*, Mass. Adv. Sh. (1934) 709. Overruling exceptions of Commonwealth in award of damages for land takings.

*Tirrell* v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1934) 1689. That certain income received by a Massachusetts resident from a trustee in another State was taxable at 6 per cent under G. L. (Ter. Ed.) c. 62, § 11, and not at 1½ per cent as an annuity under § 5 (*a*)

*Lowell Co-operative Bank* v. *Co-operative Central Bank et al.*, Mass. Adv. Sh. (1934) 1555. Constitutionality of Central Co-operative Bank Law sustained.

*Miles* v. *Commonwealth*, Mass. Adv. Sh. (1934) 2081. Overruling exceptions of the Commonwealth in award of damages for injuries caused by fall of a tree on a State highway.

*Treasurer and Receiver General* v. *Sheehan, executor of estate of Catherine Arnold.* That Commonwealth may recover under G. L. c. 123, § 96, from estates of deceased kindred for the support of inmates in State institutions. This decision enables recovery of substantial sums now and in the future.

of error, several mandamuses, and in questions upon referenda, before a single justice, the Commonwealth was sustained. Innumerable injunctions.

(*b*) *Superior Court.*

As plaintiff, principally suits against corporations, counties, municipalities, estates and individuals relating to collections[1] and restraints;[2] for damage to State property; as defendant, suits for land damages,[3] for defects in highways,[4] for injuries caused by State cars,[5] and for controversies in contracts.[6]

(*c*) *Probate Courts.*

In estates, for moneys due the Commonwealth; in appointments of guardians, for State wards; in probate of wills without surviving spouse or known heirs, for protecting interests of the State and of deceased's relatives,[7] the Attorney General is cited in certain cases where wills are offered for probate.

(*d*) *District Courts.*

Various matters, including libels for forfeiture of boats under the Marine Fisheries Law.[8]

B. Cases Pending November 30, 1934.

(1) *In the Federal Courts.*

(*a*) *United States Court of Claims.*

A suit[9] to recover taxes paid by the Commonwealth to the Federal government.

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[1] For income taxes; penalties for delays; fees; goods sold by State institutions; concessions at parks; board and care of persons in State schools; hospitals and institutions; damage to any State property, armories, forests, piers, etc.

[2] For trespass; usurpation of State lands; for nonconformance to statutes regulating particular businesses and societies.

[3] These suits have never been surpassed in volume, caused by prodigious public works projects, and have exacted assignment of Assistant Attorneys General for such sole purpose, never before required, to the burden of routine cases; 84 were tried, 108 settled.

[4] G. L. (Ter. Ed.) c. 81, § 18.

[5] G. L. (Ter. Ed.) c. 12, § 3B, a duty added in 1931.

[6] Controversies as numerous as the volume of contracts, caused by such projects unique in their novelty of Federal features heretofore not factors.

[7] G. L. c. 192, § 1A, a duty added in 1934 by c. 113. 51 wills examined. Validity of will contested in one trial.

[8] 4 in Fall River, 1 in Barnstable, 1 in Salem, and 1 in Hingham.

[9] *Commonwealth of Massachusetts* v. *United States.* Whether United States has right to impose excises in connection with the manufacture of articles purchased by a State or subdivision thereof; tobacco bought by the Commonwealth for use in State institutions.

(2) *In the State Courts.*

(*a*) *Supreme Judicial Court.*

There are 13 cases pending, 11 have already been argued; 3 relate to taxes;[1] the others[2] to miscellaneous matters.

(*b*) *Superior and Probate Courts.*

Routine suits, mounting in number, relating to miscellaneous matters.[3]

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[1] *Argued.*

*State Street Trust Co.* v. *Tax Commissioner.* Whether an income tax valid.

*Bryant, Executor,* v. *Tax Commissioner.* Whether an income tax valid.

*Atlantic Lumber Co.* v. *Commonwealth.* Whether a corporate excise tax valid.

*Tax Commissioner* v. *Thayer Bradley Co.* Scope of jurisdiction of Board of Tax Appeals in a case that had been removed to it, under the statute, from the Supreme Judicial Court.

[2] *Merchants Casualty Co.* v. *Justice of the Superior Court.* Certiorari to review decision of a justice of the Superior Court.

*Smith* v. *Springfield.* Whether city laborer removed without fault under Civil Service Law entitled to vacation provided for by the statute.

*Crossman et als., Petitioners.* Grade crossing abolition in Taunton.

*Town of Mount Washington* v. *Secretary; Wright* v. *Secretary.* Questions on steel trap referendum.

*Maher et al.* v. *Commonwealth.* Exceptions of the Commonwealth in award of damages by a board of referees appointed by the Supreme Judicial Court for areas flooded by the Swift River Valley project.

*Barry* v. *Kennedy.* Appeal by defendant, claiming "extras" against the Commonwealth, from decree and order denying motion to recommit a master's report on a petition to enforce a lien in a road contract.

*The Billboard Cases* — the most important of all cases — were argued for three days in November, 1933. There has been a long period of litigation. The question involved is the right of the people to regulate the placement of billboards by the regulations promulgated in 1920 and 1921 by the Department of Public Works pursuant to a statute enacted in 1920 (c. 545) under Mass. Const., art. 6, ratified by vote of the people in 1918; these cases were begun before my tenure, but at no time has the Commonwealth permitted delay in any stage of the cases. They are five consolidated bills in equity, begun June, 1925, enjoining the Commissioner of Public Works from enforcing the rules on the ground of unconstitutionality of the rules and of the statute authorizing them: "The Commonwealth Case" (13 cases — *General Outdoor Advertising Co., Inc. et als.* v. *Department of Public Works*); "The Chevrolet Sign Case" (*Charles I. Brink* v. *Department of Public Works*); and the "Concord Case" (*General Outdoor Advertising Co., Inc. et als.* v. *Samuel Hoar et als.*). Report of master June 2, 1931; recommitted September, 1931; supplemental report filed August, 1932; motion to recommit argued August, 1932; denied May 22, 1933, by a single justice. May 24, moved to confirm master's report and entry of final decrees; May 25, complainants appealed from denial of motion to recommit; June 23, cases reserved for Full Court; argued November, 1933. Many months elapsed while matters were under consideration by master and courts. These 23 outdoor advertising parties were represented by ablest counsel. Meantime they maintained their boards. The cases were assigned to the then Assistant Attorney General James S. Eastham, who continued as Special Assistant Attorney General to represent the State in their progress, after his resignation from the regular staff and after denial by the Legislature of any provision for filling the vacancy. Probably of all pending cases, this is the one case where my office, on behalf of the plain people, with meagre means, has fought might and influence. As this report goes to press, the decision is received supporting the Commonwealth.

*Not Argued.*

*Crane* v. *Commonwealth.* Appeal by plaintiff from finding for the Commonwealth in an action for alleged extra work under a building construction contract.

*Commonwealth* v. *Benesch et als.* Exceptions by defendants in a case where defendants had been found guilty on indictments of conspiracy to steal and conspiracy to violate the Sale of Securities Act, prosecuted by the Attorney General, wherein about $4,000,000 stock was fraudulently sold to the general public.

[3] 424 land damage suits alone.

Appeals (2 by the Commonwealth) in 5 industrial accident cases from single member and from the Board on review.

*Commonwealth* v. *Edgar B. Davis.* Perhaps the most important pending in the Superior Court. Bill in equity to apply assets of defendant in the hands of others to satisfy an execution taken out against him after the Supreme Judicial Court (284 Mass. 51) had overruled his exceptions to proceedings in an action of contract, tried in the Superior Court, for recovery of an income tax and in which a Suffolk County jury returned a verdict for the Commonwealth. Judgment is in the sum of $535,008.53.

2. Services in General Legal Matters not Occasioning Litigation.

(*a*) *Contracts and Leases.*[1]

The number of contracts for approval as to form greatly increased, occasioned by the public works projects. A large number related to Federal-aided projects, involving new considerations; many of them, dependent upon action in Washington, were received, while commencement of work was imminent, and required intensive concentration after hours and week-ends to rush corrections, by various forwarding agencies, to safeguard the State and to secure all rights to workers, in order that not a single searcher for work or a single day's pay be delayed on a single job.

(*b*) *Titles.*

Increased purchases and takings of land swelled the number of titles forwarded for approval.[2]

(*c*) *Forms of Documents.*

Conformance to Federal aid requirements and new type of projects occasioned extensive redrafts of many existing forms as well as drafts of new ones.

(*d*) *Legislative Service.*

While the Legislature was in session, aid in drafting bills, compilation of data, advice to representatives and senators, was constant.

(*e*) *Opinions.*

The written opinions are annexed.[3]

3. Services in Matters Affecting the Commonwealth Occasioning Conduct before Various Tribunals.

(*a*) *The Interstate Commerce Commission.*

This[4] was a protest against grant of increase of freight rates petitioned for by the railroads in New England and trunk line territory. The Commonwealth had standing in that it is a shipper. The estimated cost to the State, of this increase in the price of transportation of commodities is $200,000. The tenor of the protest was that increase was unnecessary, in that vast revenues are available by charging for services of various kinds now maintained by the railroads for favored shippers — the cost of which is absorbed into general operating expenses and

[1] 575 contracts; 111 releases; 38 leases.

[2] Though the Legislature has placed responsibility upon the Attorney General to approve all titles, it has denied him the facilities for search, upon which his approval must be based. The several departments acquiring land assume the prerogative of selection of their own examiners, whose abstracts are then submitted to the Attorney General. In two preceding years I have pointed out to the Legislature the economy and rightfulness of centralization of facilities, with consequent uniformity in and complete library of abstracts, but the Legislature denied. Approved 682 titles.

[3] As required by G. L. (Ter. Ed.) c. 12, §§ 9, 11.

[4] *Ex parte No. 115.* Before the Interstate Commerce Commission. The hearing was assigned for December 4. The contention of the Attorney General was that the railroads had revenue available by imposing charges as they do at Boston, charges for services in handling wood pulp, now gratuitously maintained at Baltimore and Portland; charges for dockage and lighterage, now gratuitously extended to shippers at New York; charges for many incidental services, now gratuitously extended in freighting at coastal points, between car and ship, from which they might derive revenue as they do in freighting at interior points between car and vehicle on land; charges for many services now tendered steamship lines gratuitously and at great cost to the railroads.

assessed upon all shippers. The protest, though appearing to be in opposition to the railroads, was in fact in aid of both the Commonwealth and of the railroads; of the former, by fighting increased levies upon the taxpayers for transportation of food and fuel for humanitarian care of the sick and infirm; of the latter, by disclosing sources of revenue to enable more work and wages for employees and more dividends for investors.

(*b*) *The United States Shipping Board.*

The Commonwealth, joined by Boston and the Port Authority, filed a complaint[1] demanding termination of discrimination against the Port of Boston by some 96 steamship lines in denying to shippers at the Port of Boston the free time after cargo discharge and free storage extended to shippers at the Port of New York, — a discrimination calculated to the ruin of the Port through divergence of all shipping to New York, to the deprivation of opportunity for work and wages, and to the vassalage of the people to vested interests.

4. Statutory Service Occasioning Conduct, Legal, Administrative or Otherwise, as required by Respective Statutes.

1. *Legal Services.*

(*a*) *In Due Application of Charitable Trust Funds.*

There were 318 occasions for consideration of these trust funds.

(*b*) *For Securing to the State Treasurer Escheats from Estates Administered by Public Administrators.*

Estates of persons who decease, without will or heirs, possessed of property, are administered by public administrators, and, after payment of debts, are escheat to the Commonwealth.

It is erroneously assumed that the Attorney General has jurisdiction over public administrators in their conduct and management of estates. In fact, the sole relationship of the Attorney General to such administrators is derived from the statute[2] requiring him to represent officials of the Commonwealth, and from the statute[3] providing that the State Treasurer shall be made a party to a petition for administration and be notified of all subsequent proceedings. Any nonconformance to law is the responsibility of a District Attorney, but his cognizance of it is dependent upon notification by a Register of Probate.[4]

My suggestions for semblance of system in substitute for such slack arrangement have been too frequently denied for repetition, but the occasion for improvement remains.

The sum of $20,137.68 was escheated to the Commonwealth; 9 public administrators report no estates pending; 45 report 270 pending; and actual cash of $224,057.78; a total of 955 matters concerning such estates.

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[1] *Commonwealth of Massachusetts, City of Boston and Boston Port Authority* v. *Brockelbank, Cunard Lines et als.*

[2] G. L. (Ter. Ed.) c. 12.

[3] G. L. (Ter. Ed.) c. 194, § 4.

[4] G. L. (Ter. Ed.) c. 194, § 16.

(*c*) *Services in Behalf of Cities and Towns against Sureties of Tax Collectors.*[1]

This is a service from which the Commonwealth derives nothing, and which cities and towns may perform for themselves, but do not. It is invoked by the Commissioner of Corporations and Taxation on his reference to the Department of all uncollected taxes or, if collected, unaccounted for, two years after the date of their warrants. It requires constant concern for the clearance of arrears. Eleven suits are now pending.

(*d*) *Settlement of Small Claims.*[2]

For relief of legislative attention to resolves for payment of claims, the Attorney General was authorized to settle all claims for injuries and damages under $1,000, for any cause for which the Legislature has not authorized the State to be sued; that is, claims provable in court, like other claims, if a statute permitted. The Attorney General is empowered, therefore, to make awards as a court on legal considerations only. Award upon moral and equitable considerations — since it is disposition of the money of the taxpayers — is the sole right of the Legislature and not the prerogative of any one person. So that settlement of claims in excess of $1,000 and awardable on moral and equitable considerations is solely the province of the Legislature by enactment of resolves. If awards by the Attorney General are to be expected upon such considerations, the statute should so authorize, and the appropriation should be increased.

(*e*) *Service*[3] *in Defence of State Employees in Suits for Injuries from Automobile Accidents.*

Numerous actions under the statute providing defence of State employees sued for personal injuries arising out of accidents while driving State-owned cars in the course of duty and for payment of judgments up to $5,000 were disposed of, with payments aggregating $5,143.

(*f*) *Industrial Accident Cases.*

A service,[4] recently imposed, and no adequate facilities provided, for representation of the State in cases of injured State employees claiming compensation. Reports have mounted to 100 a month. The service safeguards the State and employees and sees that there is due provision for hospital and medical bills.

(*g*) *Approval of Town By-Laws.*[5]

By-laws become valid on approval by the Attorney General. The by-laws, zoning maps and regulations of 158 towns were passed upon.

(*h*) *Approval of Rules and Regulations of Various Departments.*

New rules and modifications of old rules were occasioned by creation of new commissions and amendatory powers of old.

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[1] G. L. (Ter. Ed.) c. 58, § 8.

[2] G. L. (Ter. Ed.) c. 12, § 3A. There were 119 claims filed, 47 approved, with a total award of $5,900.74. Of the 47 approved, 29 were for accidents with State-owned vehicles; 10 from defects in State-owned property; and 8 from miscellaneous causes.

[3] G. L. (Ter. Ed.) c. 12, § 3B.

[4] St. 1933, c. 315.

[5] G. L. (Ter. Ed.) c. 140, § 2.

(*i*) *Service to the Legislature.*

While the Legislature was in session, service in drafting and advising upon bills for legislative members and in rendering data to legislative committees was extensive.

There were three investigations ordered.[1]

(*j*) *Grade Crossing Abolition.*

Aside from other service in certain proceedings, this service pertains to apportionment of costs as member of a board.[2]

2. *Administrative Services.*

(*a*) *Service on Administrative and Semi-Judicial Boards.*[3]

Membership on various boards exacted much personal time in hearings, visitations and conferences from other official duties.

(*b*) *Service for F. E. R. A. and Other Authorities.*[4]

This service was voluntarily and personally assumed, as no statute is pertinent.

## III. Suggestions and Recommendations.

The Attorney General is authorized to make "suggestions and recommendations as to the amendment and the proper and economical administration of the laws,"[5] as well as suggestions and recommendations relative to matters concerning which he has advised the Legislature or the Governor and Council. This provision logically finds satisfaction in suggestions for clearance of ambiguities and technicalities in existing statutes, as revealed by examination and experience; but I have conceived the office of Attorney General to be more than that of an attorney,

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[1] As to pollution by institution sewerage (Res. 1934, c. 27).

As to sanitary conditions around Lake Quinsigamond (Res. 1934, c. 32).

As to sewerage disposition in the South Essex Sewerage District (Res. 1934, c. 49).

[2] G. L. c. 159, § 70; St. 1934, c. 357.

[3] To pass upon municipal emergencies and approve loans (G. L. (Ter. Ed.) c. 44, § 8 (9)).

To pass upon and approve renewal of certain temporary revenue loans by cities and towns (St. 1932, c. 303; St. 1933, c. 3).

To pass upon emergency appropriations by the city of Boston (St. 1933, c. 159).

To investigate the advisability of licensing contractors and builders and relative to certain matters relating to contracts for and the employment of persons on public works (Res. 1933, c. 33).

To approve emergency loans to meet extraordinary expenditures made on the request of County Commissioners.

Member of Advisory Commission for Mashpee (St. 1932, c. 223).

Member of Milk Regulation Board (St. 1932, c. 305; St. 1933, c. 273; G. L. c. 94, § 13).

Member of board of appeal on milk and cream dealers' licenses (St. 1933, c. 338).

Access to Great Ponds, G. L. c. 91, § 18A.

Commission on Obsolete Documents (G. L. c. 30, § 42).

An Assistant Attorney General as member of the Millville Finance Commission (St. 1933, c. 341, §§ 1–8) (Mr. Simoneau).

An Assistant Attorney General as member of Appeal Board on Automobile Compulsory Insurance (G. L. c. 261, § 8) (Mr. Clapp).

[4] Under the N. R. A., legal opinion on all town notes must be given by the Director of Accounts; on notes sold within the Commonwealth, the legal opinion of an attorney in the Director's office is accepted; on notes sold outside the Commonwealth, the opinion of an Attorney General is required.

To secure Federal grants upon projects, certain certificates of an "acting attorney" were required by the Federal Emergency Administration of Public Works. In order to facilitate the securing of these grants and to save expense for legal service, I assumed the capacity as such "acting attorney."

[5] G. L. (Ter. Ed.) c. 12, § 11.

prosecutor and solicitor, faithfully and ably rendering legal service in all matters affecting the Commonwealth.

I have endeavored to create and develop an added concept, — deriving its vital substance, not in statutes, but in the native majesty of its constitutional office, — that of a militant tribune of the people and champion of popular rights, in advocacy of measures repelling patrician oppression, and in action protecting from assail the rights of the commons to enjoyment of life, liberty and the pursuit of happiness and to equality of opportunity for such enjoyment.[1] The Attorney General, therefore, is not only capacitated by the statute to make recommendations as to "amendments" to existing laws and as to "proper and economical administration of the laws," but is capacitated by virtue of his constitutional office to make recommendations in any realm of social justice.[2]

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[1] There have been proposals, particularly to enable the so-called short ballot, as well as to conform to an alleged similarity with the Federal structure, that the Attorney General be appointed by the Governor. Never ought such proposal be adopted. There is no analogy whatever between the State and Federal offices. Under the Federal Constitution the office of Attorney General is not a constitutional one; it is a creature of Federal statute. The office of the Attorney General in the Commonwealth is the one and only office with power to represent the people in matters affecting their fundamental rights set forth in the charters of their liberties, the Constitution of the Commonwealth and the Constitution of the United States. It is the one and only office which interposes between the arbitrary will of officials of the government and the people; for it is the office designated to advise the various officials of the Commonwealth as to the legality of their conduct in relations with the people. It is the Attorney General who must appear in the courts and justify himself in the event any person is aggrieved by official conduct advised by him. As no legal counsel for such officials other than the Attorney General can be recognized in the courts, his becomes the one and only tongue which by silence or sound may suffer or summon the sole security of the people against wrongs. Never should such security become spoil. Never should the office of the Attorney General be beholden to any one person for favored enjoyment. The Attorney General is the servant of the plain people, and should forever be held answerable to them and to none other. Forsaking of this principle surrenders its sovereignty for sacking.

[2] Recommendations in prior years are examples —

In 1928 Clarification and unification of all proceedings relating to children and domestic relations.
Clarification of laws relating to plumbing.
Recording of automobile conditional sales to avoid futile litigation.
Increase of penalty for killing fowl by poison.
Empowering the Attorney General to summon witnesses.
Institutional care for drug addicts, apart from criminal process.
Regulating overnight camps.
Regulating sale of narcotics.

In 1929 Abbreviation of initiative and referendum questions on the ballot.
Study for general tax reform.
Creating Board of Tax Appeals.
Relief of motor vehicle owners in excise taxes, by fixing year of manufacture as year for valuation and by abatements on change of ownership.
Greater recourse by the courts to psychiatric information in civil as well as in criminal proceedings.
Compulsory automobile insurance for damage to property as well as injuries to the person.
Making "false swearing" a misdemeanor, eliminating necessity of materiality for proof of perjury.
Police instruction, standardization of police pay, uniformity in personal equipment, respectable quarters, and installation of police devices for interstate and intrastate contacts.
Protection of poultry owners against thieves.
Supervision of foreign charitable corporations collecting relief in Massachusetts.

In 1930 Maintenance of accounts by organizations soliciting charities on the street, open to inspection by Department of Public Welfare.
Power of police officers to arrest without warrant a person operating a motor vehicle while under the influence of intoxicating liquors, whether such persons have license to operate in his possession or not.
Training schools for police officers.
Restoration of benefits to widows and dependents and children of call firemen.
Simplification of initiative and referendum questions.
Filing of bonds by brokers and salesmen to indemnify against losses through fraud.
Filing of detailed information as condition precedent to sale of securities.

## A. Recommendations Capacitated by Statutes.

1. In "proper and economical administration of the laws."

### *a. In Criminal Matters.*

(1) In the control of crime by detection or apprehension.

(*a*) *That there be an annual conference of every public police agency for consultation for control of criminal activities.*

In 1933, I summoned a conference of every public police agency in the State for consultation as to measures for co-operation and for co-ordination of their several facilities. This conference proposed a measure for such co-ordination; it opposed unification and consolidation of the several departments under State control. I recommend that legislation enable an annual police conference[1] for considering the furthering of mutual efforts in the common cause of suppression of crime.

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Prohibiting brokers from pledging, other than as collateral for bank loans, stock of purchasers on part payment, to prevent dumping of the stock for market manipulation to the ruin of the purchaser.
Regulation of "Investment Trusts."

In 1931 Creation of Title Examiner in Department of the Attorney General.
Impartial examination and report by experts as to land valuations in suits for land damages.
Elimination from the election law of the word "pauper."
Payment of old age assistance to all persons entitled thereto, whether or not inmates of institutions.
Protection of Christmas, vacation and tax club accounts by exemption from restrictions applicable to general deposit accounts.
Prohibiting banks from engaging in general brokerage business in securities and from selling to trusts and estates, within their control, securities in which they are interested, and prohibiting officers of banks from becoming officers in corporations engaged in selling securities.
Prohibiting banks from drawing wills and performing legal services, listing "investment contracts" as "securities."
Prohibition of tipster sheets by forbidding advertisements by other than registered brokers.
Requiring agents and brokers dealing in compulsory automobile insurance to keep records, accessible to the Commissioner of Insurance.

In 1932 Banking reforms and remedying defects.
Extending time for accommodating home owners by co-operative banks.
Enabling co-operative banks to affiliate with the Home Loan Bank.
Exempting violation of traffic regulations from records of crime.
Protection of the people by restriction on collection agencies.
Abolition of right to arrest any person for mere failure to pay costs in service of tax bills.
Control of holding companies under the Department of Public Utilities.
Licensing of cattle and milk dealers.
Right of labor for greater equality of work with wealth produced by it.
Increased penalty for the crime of kidnapping.

In 1933 Forfeiture to the State of all money seized in gambling raids.
Prohibition of imitating court processes and legal papers.
Exemption of wages from attachment up to $20, and no attachment until after court order.
State system of savings bank deposit insurance.
Stays of foreclosure of mortgages on homes.
Encouragement to Massachusetts farmers and dairymen.
Permanent provision for workers incapacitated from gaining livelihood through diseases contracted in occupations.

[1] This may be accomplished by an act authorizing the Attorney General to call such conference, and authorizing the heads of every public police agency to attend.

(*b*) *That there be co-ordination of State and municipal facilities for capturing criminals.*

I recommend the creation, as proposed by chiefs of police in 1933, of a commission for co-ordination of State and municipal facilities for detection and apprehension of criminals.[1]

(*c*) *That Massachusetts make compacts with all other New England States and New York State for co-operation in capture and prosecution of criminals.*

To enable planned co-operation between this Commonwealth and the other New England States and New York, I recommend interstate compacts under the provisions of the Congressional Interstate Compact Bill.[2]

(2) In the control of crime by correction.

(*a*) *That there be study for creation of a tribunal for imposition and disposition of penalties to effect their purposed efficacy for correction of crime, by eliminating variances of sentence for similar offences and by utilizing social data.*

As one means for more effective control, by more scientific and uniform mode of imposition and termination of penalties, purposed for deterrence to crime, for protection of the people by confinement of the criminally disposed, and for correction of offenders through rehabilitation, I recommend a study toward, or the creation of, some tribunal — either of the courts or of the courts and lay persons,

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[1] This may be effected by enactment as follows:

An Act relative to Concerted Action for Capture of Criminals by Co-ordination of Police Facilities.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter one hundred and forty-seven of the General Laws, as appearing in the Tercentenary edition thereof, is hereby amended by adding at the end of section thirty-one thereof the following new section: —

*Section 31A.* There shall be an advisory and executive council of police, serving under the governor, which shall consist of the commissioner of public safety, the captain of the metropolitan district police, and three members of police departments of cities and towns of the commonwealth appointed by the governor for terms of three years, with the advice and consent of the council. The council shall be authorized to recommend uniform practices of administration, forms of blanks and records, to prepare and effect plans for the orderly installation or employment of radio and teletype service as may be, to co-ordinate all police facilities in the commonwealth for concerted action in the detection of crime and the capture of criminals, and to report to the governor upon his request for investigation of existence or commission of crime anywhere in the commonwealth.

The members of the council, other than such as may be in the employ of the commonwealth, shall be allowed the necessary expenses incurred in the performance of their duties, subject to the approval of the governor and council, to be paid from the treasury of the commonwealth.

SECTION 2. After the effective date of this act the governor, with the advice and consent of the council, shall appoint three persons, who shall be heads of the police departments of cities or towns, to serve as members of the advisory or executive council of police, of whom one shall serve for the term of one year, one for the term of two years, and one for the term of three years as the governor may designate. Upon the expiration of their respective terms their successors shall be appointed as hereinbefore provided.

[2] Though the Attorney General may prepare for such compacts upon his own initiative, by negotiating with the Attorney General of another State, and by later submitting a draft to the Legislature for consideration, it appears to me to be wiser that the Attorney General be authorized to prepare such compact, so that he may be definitely informed by the Legislature as to the character and extent of matters which it might ultimately approve, and to the end that not only may he have assurance that his efforts for an interstate compact are agreeable, but that he may have knowledge of the exact matters concerning which to negotiate; such as the matter of summoning witnesses in other States essential to prosecution in this; or witnesses in this State essential to prosecution in others; right of our officers to arrest in other States persons fleeing from Massachusetts; right of officers of any State to arrest in this State persons fleeing to Massachusetts, and reciprocal service in the use of all criminal memoranda.

aided by psychiatrists — for imposition and termination of such penalties and toward modification of existing penal provisions to harmonize therewith.

(3) In the control of crime by prevention.

(*a*) *That there be a study for rewards for jury service and for selection and assignment of jurors, to effect its purposed efficacy, by impartial and intelligent judgments.*

In the phase of prevention, as one means for more effective control, through further perfecting the efficacy of juries which were purposed to establish justice by intelligent and impartial judgments, I recommend study toward recognition of the merits of jury service in civil and criminal cases, through added accommodations and rewards to jurors, and through selective assignment processes and other measures, entailing less inconvenience and less likelihood of importunity by partisans.

*b. In Civil Matters.*

(1) Effecting clarification in statutes and constitution.

(*a*) *That the mode of incumbency in the office of associate county commissioner be more definitely provided.*

At present the statute[1] forbids the election of a county commissioner and an associate county commissioner from the same city or town, and provides, in the event there are candidates for both offices from the same city or town, that the one receiving the most votes shall be elected. It thus may happen that a candidate for associate county commissioner receiving the highest number of votes for that office may have more votes than a candidate for county commissioner, resident of the same city or town, receiving more votes than any other candidate for the office of county commissioner but less in total than the votes received by the candidate for associate county commissioner. In this event, the associate is declared elected and the election of the county commissioner is thrown to a candidate from another city or town who in fact may have received but few votes.

The primaries further complicate this statutory election, for in the event candidates for both offices run on two tickets, conceivably there may be more than one candidate for county commissioner and more than one candidate for associate county commissioner, all from the same city, upon one ticket, and like candidates upon another ticket. Under the strict terms of the statute, which forbid two incumbencies from the same city and prescribe that the one polling the most votes be elected, the nomination of candidates for both offices upon one ticket would be denied, for the reason that even if both received more votes than their opponents on the other ticket, only one could qualify.

The statute prescribes a mode for filling vacancies in event of disqualification, so caused, to office of associate county commissioner, but none for vacancies so caused in the office of county commissioner. Conceivably, therefore, at a primary, a candidate upon one party ticket for associate county commissioner from a certain city or town may receive more votes than a candidate upon the same ticket for county commissioner from the same city, and the party would be thus left without a candidate for county commissioner for lack of provision for sub-

[1] G. L. c. 54, § 158.

stituting some candidate of the party resident in some other city or town. Furthermore, in event that the other party should nominate its candidate and he should be from the same city, the lack of representation at the election would be resented by the other party, even though the predicament had been accomplished by original multiplicity of their own candidates for the two offices and by casting a vote for their candidate for associate county commissioner heavier than for their candidate for county commissioner.

Under the statute and peculiar contingencies, the contest for the office of county commissioner becomes, not a simple rivalry between candidates, but a rivalry with any contestants for the office of associate county commissioner, resident in the same city, to disqualify one or the other by polling the most votes, with frequent paradoxical results of the rejection of a candidate for the major office who had defeated other candidates for it, and of election of a candidate to the minor office who received but a pittance of the votes cast.

I suggest legislative consideration of a mode for incumbency to the offices of county commissioner and of associate county commissioner, for nomination and elections, for filling vacancies and for representation of both parties by candidates for both offices at both primaries and elections. I suggest the appointment of associate county commissioners[1] as a mode of avoiding experienced predicaments.

(*b*) *That the form of questions and descriptions of laws appearing upon the ballot be simplified.*

The form of questions is prescribed by the Constitution,[2] which appears simple enough, but which in practice is most confusing. In brief, the form is, "Shall a law (insert description) approved or disapproved by the General Court (insert the vote thereon) be approved?" Two events occasion the confusion: first, the proposal of a law intricate and voluminous, requiring such length and detail of prescribed description as to cause too concentrated thought for easy comprehension of the law and for accuracy in answering the question, so suspended: second, proposal of repeal of a law, requiring, by the prescribed description and form of the question, such a double negative as to jeopardize any answer.

The nature of description of laws is prescribed by the Supreme Judicial Court.[3] It must be (1) "an impartial statement of the dominant and essential provisions so that thereby they (the voters) may obtain an accurate conception of its many characteristics"; (2) "a fair portrayal of the chief features of the proposed law in words of plain meaning"; (3) "complete enough to convey an intelligent idea of the scope and import"; (4) "not clouded by undue detail nor yet so abbreviated as not to be readily comprehensible"; (5) "free from any misleading statement, whether of amplification, of omission or of fallacy"; (6) "contain no partisan coloring"; (7) "in every particular fair to the voter"; (8) so "that intelligent and enlightened judgment may be exercised by the ordinary person in deciding how to mark the ballot."

In event of proposed laws, often containing many sections and subsidiary provisions, and of constitutional amendments, the sheer necessity of narration of all

[1] A bill has been filed.
[2] Mass. Const. Amend. XLVIII, "The Referendum," III. Form of Ballot.
[3] *Horton* v. *Attorney General*, 269 Mass. 503.

the dominant and essential provisions of itself precludes even the first requirement, — brevity.

Suggestions for simplification previously advanced, both by me and by the Secretary of State, were not adopted. Experience has since demonstrated a demand for simplification.[1]

(2) Effecting protection of the people by preservation of their homes against loss for nonpayment of taxes.

(*a*) *That study be made for enactment of further measures enabling home owners to redeem their homes taken for nonpayment of taxes and to retain their homes now under hazard through the demand*[2] *for payment of taxes in 1935 earlier than usual.*

Under the statute[3] which authorized the State to loan money to cities and towns prior to July 1, 1935, on tax titles taken or purchased by such cities or towns, payable on redemption, $15,190,283.11 was loaned. The notes are renewable annually. Though $4,399,283.11 has been repaid and is an index presumably of the capacity of home owners to redeem, there is $10,791,171.28 outstanding. The present mode of redemption[4] provides for an initial payment of 50 per cent of the tax for which the property was taken, together with costs, charges, fees and interest due at the time of payment; and, before the time of petition for foreclosure (two years from the date of taking), the balance, and a first instalment of not less than 50 per cent of each year's taxes which may have been added to the tax title account, and a second instalment of their balance. Upon such payment the foreclosure of the equity of redemption may be extended one year.[5] In the event that foreclosure be imminent, namely, two years from date of taking, there would have to be very substantial payments on account of the tax for which the land was taken and of the interim taxes, in order to obtain an extension of one year beyond the original time for foreclosure. I believe the large amount of outstanding taxes indicates an inability which urges immediate action for more remedial means for redemption, both in instalment percentages and in time of payment, — such as instalments of 25 per cent, and if the taxes for which land was taken were paid in full, an extension of time before the three-year limit expired for payment of such taxes as were added to the account, and an extension of the same time for redemption from individuals as from a city or town. Under the statute the payment of taxes in 1935 begins in July. As this demand will come so shortly after payment of the taxes assessed for 1934, or after payment of arrears, it is obvious that hardship will ensue. I direct attention to the circumstance and urge measures which, after study, may be best calculated for alleviation.

[1] This could be effected in the Constitution by changing the form of question thus: "Shall an amendment to the Constitution or law be approved which provides (abbreviated description)?" Inasmuch as every voter receives a pamphlet describing the law in full and the arguments for and against it, an abbreviated description would suffice to identify such law. Simplification could also be effected by changing the provision in the Constitution which requires that the description of a law upon the ballot shall be the same as the description printed on blanks for signatures on initiative petitions and referenda.

[2] St. 1933, c. 254.

[3] St. 1933, c. 49.

[4] St. 1933, c. 325, § 10.

[5] G. L. c. 60, § 65.

(3) Effecting protection of the people by preservation of their competence against the extortion of monopolies.

(*a*) *That the Attorney General have power to prosecute as well as to restrain any person effecting a monopoly in articles of common use, or preventing competition and the free pursuit of any lawful business.* [1]

Although the Attorney General is authorized [2] to proceed civilly to restrain monopolies, and though restraint, if ordered, operates as a forfeit for past conduct, through prohibition of future business, he is not authorized to proceed criminally. Such authorization, and heavy penalties, as well, should be provided for protection of the people.

(*b*) *That the Attorney General have power to restrain as well as to prosecute for particular acts, persons discriminating in the sale of commodities for the purpose of destroying the business of a competitor or combining with others for the purpose of destroying the business of any one and of causing a monopoly.*

Although the Attorney General is authorized [3] to prosecute criminally for discriminations and combinations, he is not authorized to proceed to restrain any business so engaging in the practice. Though forfeiture of business privilege ensues on conviction, yet contingency of conviction and lapse of prior time enable continuance in the interim. Restraint would be more salutary.

(4) Effecting protection of the people by preservation of their savings against loss in banks.

(*a*) *That insurance of deposits in savings banks and of shares in co-operative banks be made permanent.*

Last year I recommended insurance of bank deposits, which I had advocated as early as August, 1933, at the Convention of the Attorneys General of the United States at Grand Rapids. Legislation ensued [4] and administration of savings bank deposit insurance was placed in the Mutual Savings Central Fund, Inc.,[5] and of share insurance [6] in the Co-operative Central Bank,[7] the existence of both of which will terminate, under provisions of the acts creating them, in about two years. The duration of the Mutual Savings Central Fund, Inc., ends five years from the date of its incorporation, March 2, 1932. Its purpose was the creation of an agency capable of advancing liquid funds to any member bank by way of loan. It was adopted as the administrative agency of the deposit insurance fund. The Co-operative Central Bank was designated the administrative agency of the share insurance fund. By virtue of its existence, the shareholders in three small

[1] This may be accomplished by amending G. L. c. 93, § 2, by adding: "Violation of any provision of this section shall, if the offender is an individual, be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not less than one month nor more than one year, or both; or, if the offender be a corporation, by a fine of five thousand dollars."

[2] G. L. (Ter. Ed.) c. 93, § 3.

[3] G. L. (Ter. Ed.) c. 93, § 12.

[4] St. 1934, c. 43.

[5] St. 1932, c. 44.

[6] St. 1934, c. 73.

[7] St. 1932, c. 45.

banks, members of the Central Bank, will be reimbursed for the entire amount represented by their shares which they otherwise would have lost *in toto.*

Provisions should be enacted to continue the existence of both these agencies to enable the permanency of insurance of deposits in savings banks and of shares in co-operative banks.

(5) Effecting protection of the people by preservation of their livelihood against diversion elsewhere of the industry and commerce of the Commonwealth upon which they depend.

(*a*) *That the Boston Port Authority be strengthened to capacitate it as a recognized, vital and major activity of the Commonwealth, by bestowal of powers and jurisdiction, beyond its present concerns, to all matters essential for promoting policies for the industry and commerce of the whole Commonwealth.*

The Boston Port Authority[1] is a city board, although two members are appointed by the Governor. The prosperity of the Port is not solely the concern of Boston. Indeed, it is more the concern of the whole Commonwealth. Since its establishment, four years ago, this Authority has fought valiantly to further the prestige of the Port. Traffic has steadily diminished. This is not due to contemporary events. The decline was first noted twenty years since. This decline and untoward trade practices by carriers are graphed in noticeable relation. Obviously confinement of this Authority to the physical area and properties of the Port itself isolates it from the very sources from which sustenance must come. The control and management of Commonwealth Pier and terminal properties of the Commonwealth and of Boston might be transferred to this Authority, the revenues derived therefrom be made available for improvement of the Port; the cost either in part or in whole be borne by the State; and the present powers be broadened to enable it to fight practices of carriers by sea and land now devastating it, and to mobilize the forces of Massachusetts for industrial and commercial aggression.

## B. Recommendations Capacitated by the Constitution.

1. As to "the natural essential and inalienable rights . . . of enjoying and defending their . . . liberties."

*a. That no man be deprived of his liberty by summary arrest and imprisonment, to secure payment of personal fees for serving bills for real and personal taxes, and to secure payment of such taxes; and that civil proceedings be substituted.*[2]

Though previously recommended and denied, I again urge its adoption. I deem that no man should have right to jail another to secure for himself pay-

[1] St. 1929, c. 229.

[2] This may be accomplished by enactment of the following:

An Act prohibiting Arrest and Commitment for Non-Payment of Taxes and of Service Fees and providing for Payment of Such Taxes and Fees through Civil Proceedings.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by authority of the same, as follows:*

Section 1. Section thirty-four A of chapter sixty of the General Laws, as appearing in the Tercentenary edition thereof, is hereby amended by inserting after the word "if" in the third line the words: —

ment of personal fees for serving legal process. The collection of debts by jailing was banned long since and this relic of barbarism should likewise be. Triple fees for triple technical items, though for a single service, are sometimes exacted. Men may be dragged from the workshop and run into jail, though in fact the amount of tax be illegal and excessive, and though no tax may be due.

*b. That study be made for enactment of laws protecting the right of the people to pursue any legitimate business, free from compulsion, effected by any person or combination of persons, by trade practices, whether or not purposing monopoly; and of laws declaring such trade practices to be against public policy.*

Usually the destruction of competition is for the purpose of effecting a monopoly. Such destruction for such effect is already prohibited. But destruction of business is oftener purposed for mere elimination of a competitor, no monopoly resulting. Often conformance to the will of another, by threat and power of trade recrimination and reprisal, — and not destruction, — is purposed. Suitable provisions for relief and remedies against such trade practices by individuals, singly or in combination, may best be drafted, after study.

2. As to "the natural essential and inalienable right of . . . seeking and obtaining their . . . happiness."

*a. That natural resorts be made available to the common people by dedication of tracts of shore for their enjoyment.*

The common people have equal right with all others to happiness by enjoyment of the natural resources and resorts of the Commonwealth. Private possession of vast stretches of shore now excludes the general public. The right of all the people to obtain happiness by such enjoyment may be equalized by purchase or takings of appropriate sites.

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, in case of an assessment on land, the land is not sold or taken therefor within two years from the first day of October in the year of assessment, or if, — so as to read as follows: — *Section 344.* A person shall not be committed to jail for non-payment of a tax, nor shall a person so committed be further detained therein, if, in case of an assessment on land, the land is not sold or taken therefor within two years from the first day of October in the year of assessment, or if he gives to the collector or to the officer charged with the service of the collector's warrant a bond running to the collector sufficient in amount to cover the amount of the tax and all interest and other charges and fees which are or may become due thereon, conditioned to pay the same to the collector or officer within thirty days thereafter or within such further time as the collector or such officer may fix, and with such surety or sureties as the collector or officer or a master in chancery may approve. A person shall not be committed for such non-payment until he has been given a reasonable time to procure such a bond.

SECTION 2. This act shall apply to unpaid taxes heretofore or hereafter assessed.

## IV. Conclusion.

*a. Retrospect.*

No man should forget that credit for success is not entirely his but others, without whose help he could have attained nothing. So in the administration of the office of Attorney General, its merit is due to every one of those who, with greatest courtesy, ability and fidelity, have rejoiced in establishing the popularity and prestige of the office of the People's Attorney General. To the Assistant Attorneys General[1] I express my gratitude. The innumerable letters of commendation from departments and officials, for service in litigation or otherwise, evidence the cordiality of relations, which it has been my policy to maintain, and their competency of service; the decisions[2] of the Supreme Judicial Court, sustaining the Commonwealth in four out of every group of five cases, evidence their learning in the law.

The other members[3] of the department have been equally zealous in furthering the common service to the people, and with great pride and praise, I thank them.

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[1] To Mr. Roger Clapp, executive throughout my administration, for his care and counsel, his logic, maturity of judgment, and soundness in law.

To Mr. Charles F. Lovejoy, for his acumen and erudition, and for his intensive application to and solution of problems, intricate and abstruse, rarely unsustained by our highest court.

To Hon. Edward T. Simoneau, for his deliberation and skill in adjustment of all municipal matters and for his able conduct of cases, enriched by legislative, executive and judicial service, as Senator, Special Justice, Mayor and city solicitor.

To Mr. Stephen D. Bacigalupo, for his diplomacy in dealing with difficult matters, his liaison with the office of His Excellency, and for successes in the Federal and State courts.

To Mr. George B. Lourie, for his ingenuity and alertness, his zeal and success in many varied assignments and confidential missions, equally capable in court as in conference.

To Miss Sybil H. Holmes, for her capable representation of the Commonwealth in trials and in hearings, accuracy of law, and perfect performance in every responsibility.

To Mr. David A. Foley, for his rare resourcefulness, no less able in defence than in prosecution of causes, both criminal and civil, ever militant to uphold the prestige of the Commonwealth.

To Mr. John L. Hurley, for his meticulous attention to matters of great variance; his assiduity and ability at all times displayed with great merit in the department and in the courts.

To Mrs. Jennie Loitman Barron, for her utter diligence, persistence and legal wisdom, whereby, in civil and criminal matters of major importance, respect for law was enhanced by favorable verdicts and findings for the Commonwealth, establishing precedents.

Three Assistant Attorneys General have been elevated to the Judiciary during my incumbency, evidencing the high talent of the department and reflecting honor upon me and the department, — Hon. Edward T. Simoneau, Mrs. Emma Fall Schofield and Mrs. Jennie Loitman Barron.

[2] From June 14, 1928, to January 16, 1935.

[3] To Mr. Louis H. Freese, chief clerk, for his thoroughness in supervision of the thousand daily details of department routine and of details in proceedings against corporations and businesses; a career punctiliously pursued as a public servant for forty-four years in this department, with unsurpassed fidelity.

To Mr. Harold J. Welch, cashier, for his methodical and precise keeping of finances of the department, with peer nowhere; incomparable as an exacter of accounts, in a service to the State of thirty-one years without blemish.

To Miss Alice G. Brinn of the stenographic corps, who at great sacrifice to herself, bore the additional burden as my secretary throughout the six years of my tenure, I express my gratitude for her devotion, efficiency and service.

To all the members of the stenographic corps for their co-operation, excellence of work, thoroughness of detail and service of the highest order.

To Mr. Alexander D. Robinson, for his devotion to duty that knew no cessation; as aide to all Attorneys General since the time of the Honorable Hosea Knowlton.

To Mr. James J. Kelleher, for his reliableness in every task; for his scholarship in legal search; never failing once to meet expectations in services rendered as layman and lawyer.

To Miss Marion Higgins, for her superlative operation of the telephone.

The representatives of the press[1] have ever been courteous and accurate in report.

So I conclude a service which had, as sole client, the Commonwealth.[2]

*b. Prospect.*

The period of my tenure was contemporaneous with the cataclysm caused by world economic convulsion. The episodes were characterized by despair in the then existing order, by decry of want in the midst of plenty, and by rightful demand by those who had earned it for distribution of wealth, much of it amassed by absentees at no effort, physical, manual or mental.

Forgetful of the fact that foremost place among nations had been achieved by the initiative of the individual and by the form of government guaranteeing it, denunciation of the dislocations went so far as to censure every fundamental of the whole fabric, political, social and economic, and to deride the Constitution of the United States, from which all our greatness came, as a document favoring privileged classes, fostering the obsolete philosophy of want in wealth, and frustrating the future.

Forgetful, too, of the fact that foremost place had been achieved under the conscience of the Constitution, denunciation of daring measures to meet distress went so far as to fetish the letter of the Constitution while ignoring its spirit. Such forswearing of heritage was as rash as such fervor for form was idolatrous.

But bruits have beatified the spirit of the Constitution. Those who mistook means for misfortune now perceive our plights were made by man and not by its mandate. Those who mistook meaning for measures now perceive its mind as well as its mold. Under it we see the transcendence of the puissance of the people and the practice of its pristine purpose.

The first words of the first article are the substance of that purpose — equality and liberty of all men through birthright to seek and obtain happiness, to enjoy and defend their lives and liberties, and to acquire, possess and protect their property.

Early was developed religious, political and intellectual liberty by separation

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[1] To the members of the State House reportorial staff, for their courtesy and consideration, and particularly to the liaison officer between the staff and the department, Mr. Daniel O'Connor, for his reportorial accuracy and conduct that never broke a confidence.

[2] Though no statute prohibits the Attorney General from engaging in legal practice, other than as counsel or attorney for either party in a civil action depending upon the same facts involved in such prosecution or business (G. L. c. 12, § 30), I have, from the day of incumbency, denied myself any private legal practice and have refused to render any private legal service to any one anywhere or to accept from any one any money or valuable consideration, and have not had association or identification with any person concerned with any affair of State, and, particularly, with any persons or attorneys through whom the disposition of legal transactions could be effected through the Attorney General. Every political campaign was conducted at my personal expense and without contributions or expenditures in my personal behalf by any one, other than a few small items, and without subterfuge to a personal campaign committee. I have never permitted any vested interest to contribute to any nomination or election. I have never accepted any publicity, activity or service whatever from a single vested interest, for the reason that, in politics, a favor is exacted for every favor given. I have never accepted money or value for any addresses or services. All to the end that I might be in fact the people's Attorney General, free to act without fear or favor and beholden to no one but the people for honor.

To help relieve the burden of taxation, I have administered the office with strictest economy, despite the tremendous increase of business since 1925. This year the expense was less than $400 more than it was nine years ago, namely, $88,531.21. Attendance at annual conventions of the Attorneys General, dues for membership in the Association, maintenance of clippings, and expense of official attendance at functions have all been met by me personally.

of church from State, by suffrage and by universal education. Until there be social and economic liberty, the legacy of liberty lapses at birth. The flesh of no man was foreordained to fetter the freedom of his fellows. Freemen have right to live as well as to be born free. Child labor and minimum wage laws struck at the social shackles of sabotage, but we still see the spectacle of the dwindle of wages as work grows harder and more disagreeable, where the producer of wealth gets the least of it. So long as there be one soul enslaved, the struggle for social and economic security shall seethe.

All men have a right to subsistence. This postulates that all men have right to means for subsistence and right to security of opportunity to subsist. If the enterprise of social relations does not provide it, the State must.

I believe, therefore —

That as all men are born free and equal, they have right to live free and equal.

That all men have inalienable right to subsistence, to means for it, and to security of it.

That man-made misery has no place in the world.

That mortal good and not mercenary gain must have supremacy.

That the bondage of man by bondage of money must be broken.

That no man has right to wield wealth to another's woe.

That man has right to cure of his body not conditioned upon the degree of his competence.

That man has right to care of his body in indigency and infirmity.

That youth have right to higher education.

That no youth of talent should be denied the yearning of his nature by State prescription of a preliminary education therefor which poverty precludes.

That for every man there be a job and for every man only his own.

That as between men and materials in war, materials must be nationalized before men are mobilized.

That labor produces all wealth, and rewards should be in ratio to efforts and to hazards.

That no less is social and economic liberty; and no less is the conscience of the covenant of the Constitution.

As the Constitution was much the creature of the legal profession, through whose service, more than that of any other, the structure of our nation was originated and reared, so the bar, whose chief law office I have been privileged to occupy, understanding the vital forces at work and holding the ideals of social justice and liberty to be the true aims of our Constitutions, Federal and State, and seeing their fated fulfilment in the substance and scope of these charters of our liberties, will exalt its mission, as from ancient days, and "broadening down from precedent to precedent" will commode the new order and consummate these ideals.

As the faithful navigator sailing the uncharted and ominous sea came to safe bourn, with the celestial star for guidon, so, equally faithful, with the Constitution for guidon, shall we come securely to altruistic discoveries no less epochal in 1942 than in 1492.

"Old stars do not fade
Nor do alien planets rise,
Whereby man may safely venture
'Neath new skies."

As we survey the momentous future, teeming with life and action, toward which we are so rapidly and daily swept forward, summoning all to allegiance to the one Flag, we accept the challenge of the mystic generations, who in their day engloried America with religious, political and intellectual liberty, and we dedicate ourselves to the day of deliverance from social and economic captivity, visioned by the fathers, destined through the ages for our Republic — brightest credential among nations — in her full exaltation of the rights of the people to the enjoyment of "life, liberty and the pursuit of happiness."

And all nations shall call you blessed: for you shall be a delightsome land, saith the Lord of Hosts. (Malachi III: 12.)

Respectfully submitted,

JOSEPH E. WARNER,
*Attorney General.*

## Appendix.

ARRESTS IN MASSACHUSETTS CITIES FOR TWELVE MONTHS ENDING SEPTEMBER 30, 1934 AND 1933.

| | 1934 | 1933 |
|---|---|---|
| CLASS I. — *Crimes Against the Person.* | | |
| Assault | 4,468 | 4,681 |
| Manslaughter | 172 | 153 |
| Murder | 37 | 66 |
| Robbery, assault to rob and attempt | 627 | 750 |
| Other offences | 542 | 552 |
| Total | 5,846 | 6,202 |
| CLASS II. — *Crimes Against Property.* | | |
| Breaking, entering and larceny | 2,368 | 2,355 |
| Fraud, cheating and false pretenses | 219 | 342 |
| Larceny | 6,007 | 6,271 |
| Stealing ride and evading fare | 484 | 717 |
| Trespass | 614 | 618 |
| Using motor vehicle without authority | 739 | 756 |
| Other offences | 1,373 | 1,230 |
| Total | 11,824 | 12,289 |
| CLASS III. — *Crimes Against Public Order, etc.* | | |
| Drunkenness | 83,658 | 67,096 |
| Gaming and lottery laws, violation | 3,076 | 2,413 |
| Idle and disorderly (including disturbing peace, etc.) | 1,783 | 1,776 |
| Liquor laws, violation | 1,418 | 3,016 |
| Motor vehicle laws, violation | 19,814 | 21,861 |
| Narcotic drug laws, violation | 166 | 151 |
| Nonsupport | 4,553 | 3,751 |
| Sex offences (including offences against chastity, decency and morality) | 2,043 | 2,701 |
| Traffic rules and regulations, violation | 10,556 | 11,690 |
| Tramps, vagabonds, vagrants | 1,126 | 1,760 |
| Weapons, carrying | 305 | 397 |
| Other offences | 9,167 | 8,850 |
| Total | 137,665 | 125,462 |
| Aggregate | 155,335 | 143,953 |
| Automobile registrations for twelve months ending September 30, 1934 and 1933 | 951,201 | 925,982 |

## Details of Capital Cases.

1. Disposition of indictments pending Nov. 30, 1933:

**Middle District** (Worcester County cases: in charge of District Attorney Edwin G. Norman).

Raki C. Burzuker, *alias*.

Indicted October, 1933, for the murder of Retzep Idriz, at Worcester, on Oct. 8, 1933; arraigned Feb. 8, 1934, and pleaded not guilty; trial May, 1934; verdict of guilty of manslaughter; thereupon sentenced to State Prison for not less than three years nor more than five years.

Achilea Legor, *alias*.

Indicted December, 1932, for the murder of Arthimisi Legor, at Worcester, on Dec. 2, 1932; arraigned Dec. 21, 1932, and pleaded not guilty; Feb. 15, 1933, adjudged insane and committed to Bridgewater State Hospital; Dec. 11, 1933, ordered to trial; trial June, 1934; verdict of not guilty by reason of insanity; thereupon sentenced to Bridgewater State Hospital for life.

**Northern District** (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

James Deshler and Marshall J. Bowles.

Indicted November, 1933, for the murder of Adolph Sommer, at Cambridge, on Oct. 20, 1933; Deshler arraigned Nov. 10, 1933, and Bowles on Nov. 13, 1933, and each pleaded not guilty; Oct. 9, 1934, entry of *nolle prosequi* as to Bowles; trial of Deshler October, 1934; verdict of not guilty.

James T. Garrick, Herman Snyder and John A. Donnellon.

Indicted April, 1932, for the murder of James M. Kiley, at Somerville, on April 9, 1931; Garrick and Snyder arraigned April 6, 1932, and Donnellon on May 2, 1932; Snyder and Donnellon each pleaded not guilty, and entry of a plea of not guilty was ordered by the court as to Garrick; trial May, 1932, as to Snyder and Donnellon; verdict of guilty of murder in the first degree as to each; appeal dismissed by Supreme Judicial Court of Massachusetts (282 Mass. 401); petition for certiorari before Supreme Court of the United States affirmed judgment of the Massachusetts courts and established the principle that the defendant has no constitutional right under the Fourteenth Amendment to the Constitution of the United States to be physically present with the jury at the time of the taking of a view in a criminal case (291 U. S. 97); thereupon both sentenced to death by electrocution, which sentence was carried out Feb. 22, 1934; Garrick later pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than eighteen years nor more than twenty years.

Annie Wita.

Indicted September, 1933, for the murder of Anthony Wita, at Cambridge, on Sept. 10, 1933; arraigned Sept. 15, 1933, and pleaded not guilty; trial October, 1933; verdict of guilty of murder in the second degree; thereupon sentenced to the Reformatory for Women for life; Dec. 20, 1933, motions for new trial denied; claim of appeal, claim of exceptions and assignment of errors overruled.

**Northwestern District** (in charge of District Attorney Joseph T. Bartlett).

Harry Clay Bull.

Indicted in Franklin County, August, 1933, for the murder of Albert C. Jordan, at Greenfield, on Aug. 7, 1933; arraigned Aug. 21, 1933, and pleaded not guilty; trial October, 1933; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution, which sentence was carried out Feb. 22, 1934.

Edward T. Stanisiewski.

Indicted in Hampshire County, October, 1933, for the murder of Timothy L. Diggins, at Amherst, on Oct. 11, 1933; arraigned Oct. 17, 1933, and pleaded not guilty; trial December, 1933; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution; April 25, 1934, commutation of sentence to imprisonment for life.

**Southeastern District** (in charge of District Attorney Edmund R. Dewing).

John Daley.

Indicted in Norfolk County, April, 1933, for the murder of Harry Riddell, at Quincy, on Nov. 1, 1932; arraigned April 26, 1933, and pleaded not guilty; trial May, 1933; disagreement of jury; new trial January, 1934; Jan. 11, 1934, verdict of not guilty by direction of court.

Ahmed Osman.

Indicted in Norfolk County, April, 1933, for the murder of Nellie Keras, at Norwood, on Dec. 25, 1932; arraigned April 24, 1933, and pleaded not guilty; trial May, 1933; verdict of guilty of murder in the first degree; Nov. 29, 1933, rescript "Judgment on the verdict" on claim of appeal; thereupon sentenced to death by electrocution, which sentence was carried out Jan. 23, 1934.

**Southern District** (in charge of District Attorney William C. Crossley).

Louis Gwizdoski.

Indicted in Bristol County, November, 1932, for the murder of John Roselowitz; arraigned Dec. 1, 1932, and pleaded not guilty; trial April, 1933; verdict of guilty of murder in the second degree; Dec. 29, 1933, rescript "Judgment on the verdict" on claim of appeal; thereupon sentenced to State Prison for life.

**Western District** (in charge of District Attorney Thomas F. Moriarty).

Stanley Zelenski.

Indicted in Hampden County, May, 1924, for the murder of Zofia Czupek, at Chicopee, on April 2, 1924; arraigned May 26, 1924, and pleaded not guilty; March 4, 1925, committed to Bridgewater State Hospital for observation; Jan. 26, 1934, ordered to trial; trial March, 1934; verdict of not guilty by reason of insanity; June 25, 1934, rescript "Judgment on the verdict" on claim of appeal; thereupon sentenced to Bridgewater State Hospital for life.

Joseph Zygarowski.

Indicted in Hampden County, September, 1923, for the murder of Salomeja Zygarowski, at Chicopee, on July 7, 1923; Oct. 17, 1923, committed to Bridgewater State Hospital for observation; Dec. 11, 1933, ordered to trial; arraigned Jan. 5, 1934, and pleaded not guilty; trial March, 1934; verdict of not guilty by reason of insanity; thereupon sentenced to Northampton State Hospital for life.

2. Indictments found and dispositions since Nov. 30, 1933:

**Eastern District** (Essex County cases: in charge of District Attorney Hugh A. Cregg).

Louis Berrett and Clement F. Molway.

Indicted January, 1934, for the murder of Charles Frederick Sumner, at Lynn, on Jan. 2, 1934; arraigned Jan. 15, 1934, and each pleaded not guilty; trial February, 1934; verdict of not guilty by direction of the court.

**Middle District** (Worcester County cases: in charge of District Attorney Edwin G. Norman).

Joseph B. Colella.

Indicted May, 1934, for the murder of Onorio Greco, at Worcester, on Jan. 19, 1934; arraigned June 4, 1934, and pleaded not guilty; trial June, 1934; verdict of not guilty.

Edward A. Cote.

Indicted January, 1934, for the murder of Viola Cote, at Worcester, on Nov. 23, 1933; arraigned Jan. 25, 1934, and pleaded not guilty; Feb. 8, 1934, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

Patrick Doyle.

Indicted January, 1934, for the murder of Nellie Doyle, *alias*, at Clinton, on Dec. 2, 1933; arraigned Jan. 24, 1934, and pleaded not guilty; trial February, 1934; verdict of not guilty by reason of insanity; thereupon sentenced to Worcester State Hospital for life.

Angelo Ghenes.

Indicted October, 1934, for the murder of James Gamvas, at Fitchburg, on July 30, 1934; arraigned Nov. 8, 1934, and pleaded not guilty; trial November, 1934; verdict of not guilty.

George H. Sexton.

Indicted May, 1934, for the murder of Andrew Soderholm, at Athol, on Feb. 1, 1934; arraigned May 23, 1934, and pleaded not guilty; trial June, 1934; verdict of not guilty.

Clifford B. Smith.

Indicted October, 1934, for the murder of Phyllis Smith, at Athol, on Sept. 27, 1934; died from self-inflicted wounds before arraignment.

**Northern District** (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

Samuel J. Catino.

Indicted March, 1934, for the murder of Alice G. Porter, at Medford, on Feb. 20, 1934; arraigned March 12, 1934, and pleaded not guilty; trial October, 1934; verdict of not guilty.

William M. E. Gannon.

Indicted April, 1934, for the murder of Edward Cohen, at Everett, on April 5, 1934; arraigned April 9, 1934, and pleaded not guilty; May 22, 1934, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than three years nor more than six years.

Mitchell J. Gondek.

Indicted November, 1934, for the murder of Paul A. Caouette and Alice S. Caouette, at Lowell, on June 8, 1934; arraigned Nov. 5, 1934, and pleaded not guilty; trial December, 1934; verdict of not guilty by reason of insanity; thereupon committed to Danvers State Hospital for life.

Frank O'Neal, *alias*.

Indicted March, 1934, for the murder of Adolph Sommer, at Cambridge, on Oct. 20, 1933; arraigned March 14, 1934, and pleaded not guilty; March 15, 1934, entry of *nolle prosequi*.

George Sarnie, Samuel Livingston and Thomas F. Flanagan, *alias*.

Indicted February, 1934, for the murder of Adolph Sommer, at Cambridge, on Oct. 20, 1933; arraigned Feb. 13, 1934, and each pleaded not guilty; March 15, 1934, entry of *nolle prosequi* as to each.

Nick Taddeo.

Indicted December, 1933, for the murder of Paul Flagg, at Wilmington, on Dec. 9, 1933; arraigned Dec. 14, 1933, and pleaded not guilty; Feb. 27, 1934, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than twelve years nor more than fifteen years.

**Northwestern District** (in charge of District Attorney Joseph T. Bartlett).

James Suriano.

Indicted in Hampshire County, June, 1934, for the murder of Dominic Frederico, at Ware, on April 20, 1934; arraigned June 5, 1934, and pleaded not guilty; Oct. 24, 1934, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to the house of correction for two and one-half years.

**Southeastern District** (in charge of District Attorney Edmund R. Dewing).

Manuel Barros.

Indicted in Plymouth County, February, 1934, for the murder of Gladys Banks, at Carver, on Nov. 24, 1933; arraigned Feb. 21, 1934, and pleaded not guilty; June 13, 1934, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

Everett H. Lester.

Indicted in Norfolk County, April, 1934, for the murder of Frank Yuchon, at Brookline, on Feb. 9, 1934; arraigned April 9, 1934, and pleaded not guilty; trial October, 1934; verdict of not guilty by direction of court.

Constance Simons.

Indicted in Norfolk County, December, 1933, for the murder of an unnamed, new-born infant, at Wellesley, on May 24, 1933; arraigned Dec. 11, 1933, and pleaded not guilty; Dec. 27, 1933, retracted former plea and pleaded guilty to manslaughter, which plea was accepted; thereupon sentenced to the house of correction for eighteen months.

**Southern District** (in charge of District Attorney William C. Crossley).

Jalmar Karhinen, *alias*.

Indicted in Barnstable County, April, 1934, for the murder of Anna Karhinen; arraigned April 17, 1934, and pleaded not guilty; Oct. 11, 1934, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than seven years nor more than ten years.

**Suffolk District** (Suffolk County cases: in charge of District Attorney William J. Foley).

Francis E. Bennett.

Indicted February, 1934, for the murder of Victoria David, on Feb. 18, 1934; arraigned Feb. 26, 1934, and pleaded not guilty; March 19, 1934, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

Alfred Melchin and Joseph Moulcivitch, *alias*.

Indicted March, 1934, for the murder of John J. O'Donoghue, on Feb. 19, 1934; arraigned March 14, 1934, and each pleaded not guilty; April 20, 1934, each retracted

former plea and pleaded guilty to manslaughter, which pleas were accepted; thereupon Melchin sentenced to State Prison for not less than ten years nor more than fifteen years, and Moulcivitch sentenced to the Massachusetts Reformatory for eight years.

3. Pending indictments and status:

**Northern District** (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

Claude Taylor.

Indicted October, 1934, for the murder of Stanley J. Watson, at Littleton, on Aug. 23, 1934; arraigned Oct. 17, 1934, and pleaded not guilty.

Julio Ventura, Aniello Orlando, James Penta and Angelo DeVito.

Indicted October, 1934, for the murder of Luigi Girgo, at Wilmington, on Oct. 3, 1934; arraigned Oct. 11, 1934, and each pleaded not guilty.

**Southeastern District** (in charge of District Attorney Edmund R. Dewing).

Murton Millen, *alias*, Irving Millen, Abraham Faber, *alias*, and Norma Millen.

Murton and Irving Millen and Faber indicted in Norfolk County, February, 1934, for the murder of Forbes A. McLeod and Francis O. Haddock, at Needham, on Feb. 2, 1934, and Norma Millen indicted as accessory after the fact of both murders; arraigned March 10, 1934, and each pleaded not guilty; trial April, 1934, of Murton and Irving Millen and Faber; verdict of guilty of murder in the first degree as to each; July 17, 1934, motions of Murton and Irving Millen to set aside verdict and for a new trial denied; claim of appeal and assignment of errors of Murton and Irving Millen and Faber pending; trial June, 1934, of Norma Millen; verdict of guilty of being accessory after the fact of murder; thereupon sentenced to the house of correction for one year.

**Suffolk District** (Suffolk County cases: in charge of District Attorney William J. Foley).

James J. Coyne, *alias*, and John J. Moore.

Indicted April, 1933, for the murder of Charles Solomon, on Jan. 24, 1933; Coyne arraigned March 22, 1934, and Moore Nov. 14, 1934, and each pleaded not guilty; May 18, 1934, Coyne retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than ten years nor more than twenty years; Moore awaiting trial.

Nicholas Porazzo, *alias*.

Indicted April, 1933, for the murder of Michael Richardi, on Jan. 1, 1933; arraigned May 4, 1933, and pleaded not guilty; trial January, 1934; jury disagreed; awaiting second trial.

**Western District** (in charge of District Attorney Thomas F. Moriarty).

Alexander Kaminski and Paul Wargo.

Indicted in Hampden County, December, 1933, for the murder of Merritt W. Hayden, at Springfield, on Oct. 22, 1933; arraigned Jan. 5, 1934, and each pleaded not guilty; trial February, 1934; verdict of guilty of murder in the first degree as to Kaminski, and verdict of guilty of murder in the second degree as to Wargo; thereupon Wargo was sentenced to State Prison for life, and Kaminski was sentenced to death by electrocution within the week beginning Jan. 20, 1935.

Armand Santaniello.

Indicted in Hampden County, September, 1934, for the murder of Lena Resigne, at Springfield, on Aug. 12, 1934.

# OPINIONS.

*Metropolitan District Commission — Contract — Payment.*

Funds raised by an issue of bonds or notes authorized by a statute for the expenses of a particular construction project may not be used to pay expenses of another project authorized by a separate act.

DEC. 2, 1933.

*Metropolitan District Commission.*

GENTLEMEN: — You request my opinion as to whether funds raised by the issue of notes or bonds under St. 1928, c. 240, and St. 1930, c. 398, may be used in settlement of a claim by a contractor arising in connection with work authorized under St. 1928, c. 384, the balance of the fund raised under said chapter 384 being insufficient to make the settlement.

St. 1928, c. 384, authorizes the Commission to do certain work for the disposal of sewerage from the towns of Canton, Norwood, Stoughton and Walpole, and provides for an issue of bonds, not exceeding an amount named, to meet the expenditures of carrying out the provisions of the act.

St. 1928, c. 240, authorizes the Commission, by section 1, to construct a gravity drainage system for certain sewers in the city of Quincy, and, by section 3, to expend $150,000 "for the purposes of section one"; and provides for a note issue, not exceeding said sum, "To meet the expenditures authorized by section three."

St. 1930, c. 398, authorizes the Commission to construct a sewer connection for the town of Braintree, and provides for the issue of bonds, to an amount not exceeding $600,000, "To meet the expenditures necessary in carrying out the provisions of this act."

In my opinion, the Commission has no authority to use money raised under St. 1928, c. 240, or St. 1930, c. 398, except for the purpose specified in each act, i.e., to meet expenditures incurred thereunder. A payment from funds raised under said chapter 240 or chapter 398 to meet an expenditure incurred under another act, namely, St. 1928, c. 384, cannot, in my opinion, properly be made.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Trust Company — Reorganization — Preferred Stock.*

"Reorganization" as used in St. 1933, c. 112, §§ 1 and 6, defined. The minimum capital stock of a trust company required by G. L. c. 172, §§ 14 and 18, may consist in whole or in part of preferred stock.

DEC. 12, 1933.

HON. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — You have requested my opinion on certain questions involving the reorganization of a Massachusetts trust company under St. 1933, c. 112, and the issue of preferred stock pursuant to said chapter.

1. Your first question is as follows: —

"Is a reorganization of a trust company, approved by me in accordance with St. 1933, c. 112, § 1, and involving —

(*a*) A reduction of capital stock to correct an existing impairment;

(*b*) The obtaining of additional capital; and

(*c*) The charge-off of certain depreciation or admitted losses or the creation of reserves for certain assets of doubtful value —

a 'reorganization' within the meaning of section 6 of said chapter 112, so that a trust company so reorganizing may authorize and issue preferred stock in compliance with the provisions of said section?"

Section 1 of said chapter 112 provides: —

"Whenever in the opinion of the commissioner of banks, hereinafter called the commissioner, any trust company, organized under general or special laws, requires reorganization and a plan for reorganization hereunder has been approved by him as fair and equitable to all depositors, creditors and shareholders thereof and as being in the public interest, such plan may be carried out under and subject to the provisions of this act, but nothing herein shall preclude a reorganization in any other manner authorized by law. Any plan so approved shall become effective upon such approval, except that if it involves a reduction of amounts due depositors and other creditors it shall become effective as provided in section two."

The authority to issue preferred stock is contained in section 6 of said chapter, which is as follows: —

"Any trust company reorganizing under this act or resuming business under section twenty-three of chapter one hundred and sixty-seven of the General Laws or section eighty-eight of chapter one hundred and seventy-two of the General Laws, with the approval of the commissioner and if authorized by vote of stockholders owning a majority of the shares of stock thereof outstanding and entitled to vote, at a meeting duly called for the purpose, may issue participating certificates, and preferred stock of a par value of not less than ten dollars per share, in such amount or amounts and in such classes, for cash or such other good and valuable consideration and subject to such provisions, preferences, voting powers, restrictions or qualifications as shall be approved by the commissioner, and such a trust company may make such amendments in its agreement of association or articles of organization, if any, as may be necessary for any such purpose; but in the case of any newly organized trust company which has not yet issued capital stock, the requirement of vote of stockholders shall not apply but in such case a vote of a majority of the incorporators shall be required. Any or all classes of such preferred stock or certificates provided for herein may be set up upon the books of such trust company in such manner and in such amounts as the commissioner may approve."

In order to answer your question the meaning of "reorganization" and "reorganizing," as those words are used in said sections 1 and 6 of said chapter 112, must be determined.

The term "reorganization" does not necessarily imply the formation of a new corporation to take over and carry on the business of an existing corporation. The formation of a new corporation is a usual part of individual and particular reorganizations but it is not a necessary element in a reorganization. A "reorganization" is defined in Webster's New International Dictionary as "*the reconstruction or rehabilitation of a corporation*, especially a railroad, usually effected compulsorily by a receivership and foreclosure." In discussing "reorganization" the court, in the case of *De Blois* v. *Commissioner of Internal Revenue*, 36 Fed. (2d) 11, 13, said: —

"Insolvent corporations are ordinarily either reorganized or liquidated. In liquidation, creditors and stockholders get cash. In reorganizations, however effected, they get new securities, or else sell their rights. Whether court proceedings of any kind are found to be a necessary or expedient means of effecting a reorganization, are, for present purposes, a distinction without a difference. So, also, is the question whether the old security holders are required to make payments in cash in order to share in the securities of the successor corporation. The essential fact is that the right to share arises from a reorganization; . . ."

Any reconstruction or rehabilitation of a corporation which is insolvent or of a corporation with impaired capital, when the maintenance of an unimpaired capital is made by statute an essential requirement for its continued existence, as is the case with trust companies in Massachusetts (see G. L. [Ter. Ed.] c. 167, § 22), is a reorganization. It is not material whether such reorganization is effected through the medium of a new corporation or through utilizing and retaining the old corporate structure.

The language of the first sentence of section 1 of said chapter 112 makes it clear that such a reorganization need not involve the reduction of amounts due depositors and other creditors.

It is therefore my opinion that the reconstruction and rehabilitation of a trust company involving, as stated in your first question, "a reduction of capital stock to correct an existing impairment, the charge-off of certain losses, the creation of reserves for certain assets of doubtful value, and the obtaining of additional capital" is a *reorganization* or a reorganizing within the meaning of such words as employed in sections 1 and 6 of St. 1933, c. 112.

My answer to your first question is, accordingly, in the affirmative.

2. Your second question is as follows: —

"May the minimum capital stock of a trust company, required by G. L. c. 172, § 18, consist in part, and the stock required by section 14 of said chapter, for the qualification of directors, consist in whole or in part, of preferred stock authorized and issued pursuant to section 6 of St. 1933, c. 112?"

St. 1933, c. 112, § 6, provides, in part, that —

"Any or all classes of such preferred stock or certificates provided for herein may be set up upon the books of such trust company in such manner and in such amounts as the commissioner may approve."

Said section 6 also provides that said preferred stock may be issued —

"subject to such provisions, preferences, voting powers, restrictions or qualifications as shall be approved by the commissioner, and such a trust company may make such amendments in its agreements of association or articles of organization, if any, as may be necessary for any such purpose."

In view of the above-mentioned powers of the Commissioner in reference to determining the nature of preferred stock to be issued, he may provide that such preferred stock shall be capital stock within the meaning of G. L. c. 172, § 18, and that ownership of said preferred stock may make the holder thereof a "stockholder of record holding unpledged stock" within the meaning of the terms "stockholders" and "stock" as used in section 14 of said chapter 172.

The provision in the last sentence of section 7 (*a*) of said chapter 112, to the effect that "the words 'common stock' or 'capital stock', as used in this act, shall not include preferred stock or certificates issued under this act," by its very terms limits the meaning of the words "common stock" and "capital stock" only as used in that particular statute, and does not affect the meaning of those words as used in sections 14 and 18 of G. L. c. 172.

My answer to your second question is in the affirmative.

3. Your third question is as follows: —

"Is any notice to or assent by depositors or other creditors of a trust company required in connection with a reorganization under St. 1933, c. 112, which does not involve a reduction of amounts due depositors and other creditors, as provided by section 2 of said chapter?"

The last sentence of section 1 of said chapter 112 provides that any plan approved by the Commissioner, as provided in said section, shall become effective upon such approval, "except that if it involves a reduction of amounts due depositors and other creditors it shall become effective as provided in section two." The only provisions for notice to depositors and other creditors contained in said chapter 112 are found in section 2 of said chapter, which deals throughout with the procedure for reorganization involving a reduction of the amounts due depositors and other creditors. It seems clear from the express language of section 1 that no notice to depositors or other creditors is required by said chapter 112 in the case of a plan for reorganization which does not involve such reduction.

I therefore answer your third question in the negative.

4. Your fourth question is as follows: —

"Is any notice to or assent by the owners of . . . subordinated deposits who voluntarily accept preferred stock in exchange for their deposits, or any action by the Supreme Judicial Court, required under these circumstances?"

This question is in effect the same as your third question, but in connection therewith you have in your communication set forth the following facts upon which you predicate this particular inquiry: —

"Certain trust companies have as part of their deposit liability so-called 'subordinated deposits,' voluntarily made by directors, stockholders or other parties interested in the welfare of such trust companies, pursuant to agreements that the ordinary deposit liabilities of such trust companies may be paid in priority to such subordinated deposits. The owners of such subordinated deposits have agreed or will agree to accept preferred stock, issued pursuant to section 6 of G. L. c. 112, in exchange for such subordinated deposits. In each such case a plan for reorganization including such exchange has been or will be submitted to me under said chapter 112 for my approval as fair and equitable to all depositors, creditors and shareholders and as being in the public interest."

As stated above, St. 1933, c. 112, § 1, provides that a reorganization shall be effective upon the approval of the Commissioner unless "it involves a reduction of amounts due depositors and other creditors," in which case the provisions of section 2 relative to notice apply. This proviso at the end of section 1 applies only to cases where there is a pro rata reduction of the claims of all creditors and/or depositors. It does not apply to a case

where a few individual depositors or creditors voluntarily agree to release their deposits or credit liabilities and accept preferred stock in exchange therefor. No depositor or creditor can be forced to accept any reduction of his claim in a reorganization under said section 1. If, however, the proposed reorganization does not involve the requiring of any depositor or creditor to reduce his claim without his consent or against his desire, the reorganization may be consummated under the provisions of section 1 of said act, and the provisions of section 2 of said act are not applicable.

I therefore answer your fourth question in the negative.

As applicable to all your questions, it is apparent that the intent of the Legislature in enacting said chapter 112 was to give therein a broad meaning to the word "reorganization" which we have been discussing, for the circumstances surrounding its enactment, as disclosed by its title and preamble (in which latter formula it is expressly declared to be an emergency law required by the present banking emergency) indicate that the Legislature meant to provide a flexible means for the restoration to sound condition of trust companies suffering from the consequences of the severe decline in values which preceded and accompanied the banking emergency — notably insolvency and impaired capital.

In order to make as easy as possible the carrying into effect of the provisions of this emergency law, it seems plain that the Legislature intended to make notices to creditors or depositors of any contemplated reorganization an essential prerequisite to action only when the interests of such creditors or depositors were to be adversely affected by the terms of such reorganization, and did not contemplate the giving of notice in connection with a reorganization such as is suggested by your question.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Licenses — Sale of Lacquers containing Wood or Denatured Alcohol.*

Licenses mentioned in G. L. (Ter. Ed.) c. 138, § 72, as inserted by St. 1933, c. 376, § 2, include those for the sale of lacquers, etc., containing wood alcohol or denatured alcohol, and the Department of Public Health has the duty of licensing all retail dealers in such commodities irrespective of the former issue of local licenses under G. L. (Ter. Ed.) c. 138, § 34.

DEC. 14, 1933.

Dr. HENRY D. CHADWICK, *Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion in connection with G. L. (Ter. Ed.) c. 138, § 72, as inserted by St. 1933, c. 376, § 2, upon two matters.

1. The first matter as to which you inquire is in substance this: Do the licenses mentioned in said section 72 include licenses for the sale of lacquers, etc., containing either wood alcohol or denatured alcohol?

I assume from the context in which this query appears in your communication that the "lacquers, etcetera," to which you refer, contain more than three per cent of the alcohols mentioned in said section 72 and are preparations used for manufacturing or commercial purposes, and, as would seem obvious, are not intended for beverages.

G. L. (Ter. Ed.) c. 138, § 72, as amended, reads as follows: —

"The board of health of a city or town may annually grant to persons who apply therefor licenses for the sale or dealing therein, within such city

or town, of methyl alcohol or wood alcohol, so called, or denatured alcohol, or any preparation used for manufacturing or commercial purposes which contains more than three per cent of any of the said alcohols, and is intended for use other than as a beverage. The fee for such a license shall be one dollar. A registered pharmacist may make such sales without such a license. The state department of public health may annually grant to persons who apply therefor licenses for the manufacture, sale or dealing therein, within the commonwealth, and for the importation into and exportation from the commonwealth, of any of such alcohols or preparations, the fee for which shall be one hundred dollars. Licenses shall be granted under this section only if it appears that the applicant is a proper person to receive the same."

It is plain from reading the foregoing enactment that the preparations as to which licenses are required, under the terms thereof, comprehend, as set forth explicitly, any preparation used for manufacturing or commercial purposes which contains more than three per cent of methyl alcohol or wood alcohol or denatured alcohol.

Under the assumption of fact which I have made, based upon the text of your communication, as above set forth, I answer your first question in the affirmative.

2. The second inquiry in your communication reads: —

"Will you kindly inform me if, under this statute, it is necessary for this department to license all retail dealers in these articles even should such dealers possess local licenses to sell wood alcohol, denatured alcohol or preparations used for manufacturing or commercial purposes containing more than three per cent of these alcohols?"

Under said G. L. c. 138, § 72, as amended, the duty and power of licensing the *manufacture* of the alcohols and preparations referred to in said section devolve upon your department alone. That is a phase of the traffic in the said alcohols and preparations as to which local boards of health no longer have any licensing authority. Irrespective of the fact that prior to the enactment of said St. 1933, c. 376, such authority was vested in them by G. L. c. 138, § 34, the passage of the statute under consideration has deprived them thereof and given such authority to your department exclusively.

Local boards of health still have authority, under the instant statute, to license the sale of, and the dealing in, the alcohols and preparations which were formerly the subject of said G. L. c. 138, § 34 (now done away with), and are now the subject of G. L. c. 138, § 72, as amended, within their respective cities and towns.

Your department has now been given, by the last sentence of said G. L. c. 138, § 72, as amended, the power to license such sales and dealings "within the commonwealth."

In order that the provisions of said section 72 may be given a reasonable interpretation as a whole, it must be borne in mind that the intention of the Legislature, as expressed in said section 72, was, as is to be gathered from the wording of said section, to provide for State-wide licenses, which might be granted by your department and which would make unnecessary the issuance of local licenses, duplicating, as to any given locality, the authority given by the State-wide licenses issued by your department. Similarly, where a person received and desired only a license from a local board of health, limited to a specific city or town, it was not contemplated

that a further license should issue from your department in order that such person might sell and deal in the specified commodities in such city or town. It is not to be supposed that the Legislature intended such a duplication of licenses, especially in view of the setting up of such widely different fees for the two kinds of licenses. All licensees for the importation and exportation of the aforesaid alcohols and preparations are to be licensed by your department alone.

The foregoing statements as to the meaning of the statutory provisions to which you refer fully answer your second inquiry.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Commissioner of Banks — Trust Company — Resumption of Business.*

A trust company permitted resumption of business by the Commissioner, under G. L. (Ter. Ed.) c. 167, § 23, with removal of previously imposed conditions, may issue preferred stock under St. 1933, c. 112, § 6.

DEC. 19, 1933.

HON. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — You have requested my opinion upon the following question: —

"Is the resumption of business in full by a trust company, previously taken into possession by the Commissioner of Banks under G. L. (Ter. Ed.) c. 167, § 22, and which later was permitted to resume business in part under authority vested in the Commissioner of Banks by G. L. (Ter. Ed.) c. 167, § 23, and the complete removal of all conditions, restrictions and limitations and the discontinuance of all rules and regulations imposed by the Commissioner of Banks on such trust company in connection with such partial resumption of business, a 'resumption of business' within the meaning of section 6 of St. 1933, c. 112, so that a trust company so resuming business may authorize and issue preferred stock in compliance with the provisions of said section?"

In my opinion, the resumption of business in full by a trust company previously in the possession of the Commissioner of Banks, which has been operating under drastic conditions, restrictions and limitations imposed by the Commissioner of Banks, clearly is a "resumption of business" within the meaning of said term as used in St. 1933, c. 112, § 6, so that said trust company may authorize and issue preferred stock in compliance with the provisions of said section. I accordingly answer your question in the affirmative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Hours of Labor for Women and Children — Public Service — Hotels.*

Employers engaged in the hotel business are engaged in "public service," as those words are used in G. L. (Ter. Ed.) c. 149, § 56, with relation to working hours for women and children.

Dec. 27, 1933.

Hon. Edwin S. Smith, *Commissioner of Labor and Industries.*

Dear Sir: — You request my opinion as to whether a hotel is engaged "in public service," within the meaning of those words as used in section 56 of G. L. (Ter. Ed.) c. 149, which limits with the following proviso the hours of labor for women and children: —

"In cases of extraordinary emergency or extraordinary public requirement, this section shall not apply to employers engaged in public service or in other kinds of business in which shifts may be required as hereinbefore stated; but in such cases no employment in excess of the hours hereby authorized shall be considered as legalized until a written report of the day and hour of its occurrence and its duration is sent to the department."

In my opinion, the words "in public service" as used in this particular statute were intended by the Legislature to include the hotel business, a business in the maintenance of which the public is interested. It will be noted that the exemption applies only "in cases of extraordinary emergency or extraordinary public requirement," and that these terms are limited in meaning by the definition of "extraordinary emergency" given in section 1 of chapter 149, namely, "danger to property, life, public safety or public health."

Very truly yours,
Joseph E. Warner, *Attorney General.*

*Commonwealth — Sale of Lands — Departmental Funds.*

The proceeds received by a department for the authorized sale of land of the Commonwealth may not be disbursed by the department but must be paid over to the State Treasurer.

Dec. 29, 1933.

Hon. Samuel A. York, *Commissioner of Conservation.*

Dear Sir: — You have requested my opinion in the following communication: —

"Under G. L. (Ter. Ed.) c. 132, § 34A, 'the commissioner, with the approval of the governor and council, and after a public hearing, may sell or exchange any land acquired by the Commonwealth under section thirty or thirty-three. . . .'

I should like to know, first, whether or not in the case of the sale of any land purchased for State forests the proceeds resulting from such sale would be available to this department for reinvestment, or must such money be turned into the State treasury.

Second, if the money must be turned into the State treasury, is legislation required to make that sum available to this department?

I am considering at this time the possible sale or transfer of certain State forest land, and such sale or transfer would depend entirely upon whether or not the proceeds from such sale or transfer would be available to this department for reinvestment."

The proceeds received by you from the sale of land of the Commonwealth are not immediately available for disbursement by your department but are required to be paid over to the State Treasurer. In order that equivalent amounts of money might be made available for the authorized expenditures of your department thereafter, in addition to sums already provided, a legislative appropriation would be necessary. See G. L. (Ter. Ed.) c. 29, §§ 2, 18, 20; c. 30, § 27.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Milk — Foreign Substance — Vitamin D Concentrate.*

Under G. L. (Ter. Ed.) c. 94, § 19, a concentrate of cod-liver oil and cottonseed oil may not be added to milk offered for sale for the purpose of introducing vitamin D in the milk.

JAN. 8, 1934.

Dr. HENRY D. CHADWICK, *Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion as to whether the sale of milk to which has been added a vitamin D concentrate prepared from cod-liver oil may be sold in this Commonwealth, in view of the provision of G. L. (Ter. Ed.) c. 94, § 19, which reads: —

"No person shall sell any milk to which any foreign substance has been added."

I confine my opinion to the third method of producing vitamin D in milk, which you set forth in your communication to me and as to which your inquiry relates. Upon the facts which you have set forth there is by this method actually added to milk to be sold a concentrate which —

"differs little in appearance, color, viscosity, etc., from cottonseed oil, the menstruum in which the actual cod-liver oil concentrate is dissolved. It possesses no fishy taste or odor. . . .

At the dairy the concentrate is finely dispersed in milk in the proportions of 1 pound of concentrate to 6,000 quarts of milk. The addition is made prior to pasteurization. . . .

The finished product differs in no way perceptible to the senses from untreated milk . . . . not only is the cod-liver oil concentrate added to the milk, but also cottonseed oil. This material is added in concentrations of 1 to 24,000."

It is apparent from all the above and the other facts relative to the concentrate which you have set forth in your letter that the residual of the various processes through which cod-liver oil is passed, dissolved in cottonseed oil, is a "foreign substance" which is added to milk, as the words "foreign substance" are used in said G. L. (Ter. Ed.) c. 94, § 19, and that consequently the milk to which it has been so added may not be sold under the provision of said section 19 above set forth.

"Substance" is defined in the Century Dictionary as "any kind of corporeal matter." Certainly, the concentrate described by you is a kind of corporeal matter. It is obviously foreign to the substance known as milk. It is immaterial that the concentrate is not injurious. *Commonwealth* v. *Schaffner*, 146 Mass. 512.

It cannot well be said that milk to which the concentrate has been added has lost its character as milk. The low concentrations of which you have

written, 1 to 24,000, and the lack of easily ascertainable change in the substance of the milk, of which you have also written, cannot be said as a matter of law to produce a new admixture which is not itself milk. Upon the facts as you have stated them it would not appear as a matter of law that a change wrought in milk by the addition of the concentrate is comparable to the changes wrought which turn milk into butter, cheese, ice cream or condensed milk.

By reason of the foregoing considerations I am of the opinion that, upon the facts as you have set them out in your communication to me, by the mingling of the given concentrate with milk the resulting admixture is still milk, and milk to which a foreign substance has been added.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Minors — Employment in Broadcasting — Mercantile Establishment.*

Minors may not be employed or permitted to work in broadcasting in a store, nor in a dancing exhibition in a broadcasting studio where there is an audience.

JAN. 16, 1934.

Hon. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — 1. You request my opinion as to whether the employment by a commercial broadcasting company of children under fifteen "in dancing, singing, playing musical instruments, recitations, and possibly in radio plays" is a violation of G. L. (Ter. Ed.) c. 149, § 104.

Said section 104 reads as follows: —

"No person shall employ, exhibit or sell, apprentice or give away, a child under fifteen, for the purpose of employing or exhibiting him in dancing on the stage, playing on musical instruments, singing, walking on a wire or rope, or riding or performing as a gymnast, contortionist or acrobat in a circus, theatrical exhibition or in any public place, or cause, procure or encourage such child to engage therein; but this section shall not prevent the education of children in vocal and instrumental music or dancing or their employment as musicians in a church, chapel, school or school exhibition, or prevent their taking part in any festival, concert or musical exhibition upon the special written permission of the aldermen or selectmen. Whoever violates this section shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months."

I assume, from the inclusion of dancing in your question, that there is an exhibition of some sort in the broadcasting room. If so, there would, in my opinion, be a violation of section 104 as to dancing, playing on musical instruments and singing. Whether or not the performance is a "theatrical exhibition" within the meaning of those words as used in section 104, in any event I think it would be an exhibition in a "public place," within the meaning of the statute. As to dancing, the exact conditions are not stated in your question, but I think that the words "on the stage" (inserted by St. 1898, c. 394) are not to be construed in such a narrow sense as to render the statute inapplicable to a dancing exhibition given in a broadcasting room or studio. As to recitations or taking speaking parts in plays, section 104 does not appear to prohibit this.

If it be assumed that there are no spectators present in the broadcasting room and that the conditions there are in fact such that the room cannot

be properly described as "any public place," the performance would not seem to violate the terms of section 104.

2. You also request my opinion as to whether it is a violation of G. L. (Ter. Ed.) c. 149, § 60, for a department store on Saturday afternoons to use the services of children under fourteen in broadcasting either from the store or from a commercial broadcasting studio located elsewhere, under an arrangement by which any child in the community is invited to perform, but not more than once, and the only compensation offered is in the form of prizes for such children as are voted to have given the best performance, the purpose of the performance being to advertise the mercantile establishment.

Said section 60 reads as follows: —

"Except as provided in section sixty-nine, no person shall employ a minor under fourteen or permit him to work in or about or in connection with any factory, work shop, manufacturing, mechanical or mercantile establishment, barber shop, bootblack stand or establishment, public stable, garage, brick or lumber yard, telephone exchange, telegraph or messenger office, or in the construction or repair of buildings, or in any contract or wage earning industry carried on in tenement or other houses. No such minor shall be employed at work performed for wage or other compensation, to whomsoever payable, during the hours when the public schools are in session, nor, except as provided in section sixty-nine, shall he be employed at work before half past six o'clock in the morning or after six o'clock in the evening."

Where the broadcasting is done from the store, it seems clear that there is a violation of section 60. Whether or not the children are employed, within the meaning of the statute (*cf. Commonwealth* v. *Griffith*, 204 Mass. 18), they are, in my opinion, permitted to work, within the meaning of the statute (*Commonwealth* v. *Hong*, 261 Mass. 226; *Commonwealth* v. *Griffith*, 204 Mass. 18), in or about a mercantile establishment (G. L. [Ter. Ed.] c. 149, § 1). Where, however, the broadcasting is done from a commercial broadcasting station not connected with the store, section 60 does not, in my opinion, cover the case.

"Mechanical establishments" are defined in section 1 of G. L. (Ter. Ed.) c. 149, as "any premises, other than a factory as above defined, where machinery is employed in connection with any work or process carried on therein."

"Mercantile establishments" are defined in the same section as "any premises used for the purposes of trade in the purchase or sale of any goods or merchandise, and any premises used for a restaurant or for publicly providing and serving meals."

A commercial broadcasting station as such does not appear to fall within these definitions, nor is it describable as any of the other places listed in section 60.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Alcohol — Sales by Pharmacist — Sundays.*

A registered pharmacist may sell alcohol as such on Sundays and holidays for use as a drug or medicine if he has a certificate of fitness, but may not so sell alcoholic liquors.

JAN. 16, 1934.

*Board of Registration in Pharmacy.*

GENTLEMEN: — You request my opinion upon the following questions: —

"1. Can a registered pharmacist sell alcohol on Sundays and holidays: (*a*) if he has a certificate of fitness from this Board; (*b*) if he has a liquor license from the local licensing authorities?

2. Do sales of alcohol have to be recorded in the liquor book provided for by sections 30D and 30E of G. L. (Ter. Ed.) c. 138, as inserted by St. 1933, c. 376, § 2?

3. Is there any limitation as to the quantity of alcohol a registered pharmacist may sell?"

1. G. L. (Ter. Ed.) c. 138, § 29, as inserted by St. 1933, c. 376, § 2, provides that a registered pharmacist who holds a certificate of fitness "may sell alcohol, and, upon the prescription of a registered physician, (1) alcoholic liquors other than wines and malt beverages, (2) malt beverages, and (3) wines." In the same section it is provided that —

"The words 'alcoholic liquor' and 'alcoholic liquors', as used in this and the eight following sections, are hereby defined to mean any liquor intended for human consumption and containing one half of one per cent or more of alcohol by volume at sixty degrees Fahrenheit."

Section 30A of G. L. c. 138, as amended, provides that a registered pharmacist may be licensed by the local licensing authorities "to sell alcoholic liquors for medicinal, mechanical or chemical purposes without a physician's prescription, except on Sundays or legal holidays."

G. L. (Ter. Ed.) c. 136, § 5, prohibits all manner of business on Sundays; and section 6 specifies exceptions upon the application of section 5, among which is included "the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons."

The restriction contained in said section 30A as to sales on Sundays and holidays has no application to the sale of alcohol, which, as appears from said section 29, is something different from alcoholic liquor. In my opinion, a druggist, if he has a certificate of fitness, may sell alcohol on Sundays and holidays, provided the alcohol sold on Sunday is sold for use as a drug or medicine. See *Commonwealth* v. *Marzynski*, 149 Mass. 68; *Commonwealth* v. *Goldsmith*, 176 Mass. 104.

2. Sales of alcohol do not have to be accompanied by a certificate as provided for in section 30D, nor recorded in a book as provided for in section 30E. These two sections apply only to sales of alcoholic liquor by a licensee under section 30A.

3. There does not appear to be any limitation imposed by the statutes upon the quantity of alcohol which may be sold by a druggist authorized to sell under section 29.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Constitutional Law — Alcoholic Beverages — Sales —Aliens.*

Provisions of G. L. (Ter. Ed.) c. 138, § 26, as inserted by St. 1933, c. 376, § 2, forbidding sales of alcoholic beverages by aliens are constitutional and enforceable unless in conflict with an existing treaty between the United States and a foreign government.

JAN. 23, 1934.

*Alcoholic Beverages Control Commission.*

GENTLEMEN: — You request my opinion upon the following questions: —

"1. May an alien obtain a license for the sale of alcoholic beverages, or a vehicle permit for the transportation thereof, under G. L. (Ter. Ed.) c. 138, as inserted by St. 1933, c. 376, § 2, notwithstanding the provisions of section 26 of G. L. c. 138, as amended?

2. May an alien act as manager or representative of any business licensed to sell alcoholic beverages, or be employed therein to sell, serve or deliver any alcoholic beverages, under the provisions of G. L. (Ter. Ed.) c. 138, as amended, notwithstanding the provisions of section 31 of G. L. c. 138, as amended?

3. Does the fact that the alien is in this country under the provisions of the Treaty of Commerce and Navigation, entered into between the United States of America and the Kingdom of Italy on February 26, 1871, affect in any way his right to obtain a license or permit or to be employed in any such licensed business?

4. How should an alien who claims to have come to this country under the provisions of the said treaty show competent and satisfactory evidence that he has done so, in order to entitle him to obtain a license or permit or to be employed in any such licensed business?"

G. L. (Ter. Ed.) c. 138, § 26, as inserted by St. 1933, c. 376, § 2, provides, in part: —

"No license for the sale of alcoholic beverages and no vehicle permit for the transportation thereof shall be issued to any person who is not, at the time of his application therefor, a citizen of the United States, . . .

No provision of this chapter shall impair any right growing out of any treaty to which the United States is a party."

Section 31 of G. L. c. 138, as amended, provides, in part: —

"No person, except a citizen of the United States, shall be employed to sell, serve or deliver any alcoholic beverage."

A provision in the treaty between the United States and Italy (as quoted in *Heim* v. *McCall*, 239 U. S. 175, 193) is as follows: —

"'The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.'"

The provisions above referred to in sections 26 and 31 are constitutional. *Commonwealth* v. *Hana*, 195 Mass. 262, citing *Trageser* v. *Gray*, 73 Md. 250. *Patsone* v. *Pennsylvania*, 232 U. S. 138. Accordingly, I answer your questions 1 and 2 in the negative, subject to the qualification that the restrictions imposed by said sections do not conflict with

an existing treaty with a country of which an alien, whose rights are in question, is a subject.

The question remains whether the restrictions imposed by sections 26 and 31 conflict with the treaty with Italy. The provisions of this treaty have been considered by the Supreme Court of the United States in *Patsone* v. *Pennsylvania*, 232 U. S. 138, and *Heim* v. *McCall*, 239 U. S. 175. See also *Lubetich* v. *Pollock*, 6 Fed. (2d) 237. These decisions seem to require a ruling that the restrictions in question, imposed by the Legislature in connection with the control of intoxicating liquor, are not in conflict with the treaty. Accordingly, I answer your third question in the negative.

In view of my answers to your first three questions it seems unnecessary to answer the fourth.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Drug Store — Employee — Apprentice — Stockholder.*

JAN. 26, 1934.

*Board of Registration in Pharmacy.*

GENTLEMEN: — You request my opinion upon the question as to whether an unregistered stockholder in a corporation operating a drug store can, under G. L. (Ter. Ed.) c. 112, § 30, be employed in any capacity in the store.

Said section 30 reads as follows: —

"Except as provided in section sixty-five, whoever, not being registered under section twenty-four or corresponding provisions of earlier laws, sells or offers for sale at retail, compounds for sale or dispenses for medicinal purposes drugs, medicines, chemicals or poisons, except as provided in sections thirty-five and thirty-six, shall be punished by a fine of not more than fifty dollars. This section shall not prohibit the employment of apprentices or assistants and the sale by them of any drugs, medicines, chemicals or poisons, provided a registered pharmacist is in charge of the store and present therein; nor shall it apply to any unregistered co-partner or unregistered stockholder in a corporation doing a retail drug business who was actively engaged in the drug business on May twenty-eighth, nineteen hundred and thirteen."

In my opinion, an unregistered stockholder may work in the store in the manner set forth in the statute, as an apprentice or assistant, but in no other capacity, unless he comes within the exception noted in the last six lines, and as to that, the provision concerning his having been "actively engaged in the drug business" refers to having taken part in the *management* or *direction* of such a business.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Commissioner of Banks — Administrative Powers — Closed Banks.*

The Commissioner has power to establish a central organization for the supervision of banks in his possession.

JAN. 30, 1934.

Hon. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — You have requested my opinion upon the following questions: —

"1. Has the Commissioner of Banks authority under G. L. (Ter. Ed.) c. 167, with or without the approval of the Supreme Judicial Court, to establish a central organization for the supervision of banks in his possession under said chapter 167, and to apportion the expenses incident thereto among the specific banks involved?

2. Are the funds coming into the possession of the Commissioner of Banks as a result of such apportionment "money received on account of the commonwealth," within the meaning of section 1 of Mass. Const. Amend. LXIII and of G. L. (Ter. Ed.) c. 30, § 27, and thus to be paid into the State treasury?"

Referring to your first question, the Commissioner of Banks, in my opinion, has the authority to establish this so-called central organization, under the broad administrative powers vested in him, when in possession of closed banks, by the various provisions of G. L. (Ter. Ed.) c. 167.

G. L. (Ter. Ed.) c. 167, § 24, provides, in part, as follows: —

"Upon taking possession of the property and business of such bank, the commissioner may collect moneys due to the bank, and do all acts necessary to conserve its assets and business, and shall proceed to liquidate its affairs as hereinafter provided. . . ."

Section 26 of said chapter provides, in part, as follows: —

". . . The commissioner may procure such expert assistance and advice as he considers necessary in the liquidation and distribution of the assets of such bank, and he may retain such of the officers or employees of the bank as he deems necessary. The commissioner shall require from a special agent and from such assistants such security for the faithful discharge of their duty as he deems proper."

Section 30 of said chapter provides as follows: —

"The compensation of the special agents, counsel, employees and assistants, and all expenses of supervision and liquidation, shall be fixed by the commissioner, subject to the approval of the supreme judicial court for the county where the principal office of such bank is located, on notice to such bank, and, upon the certificate of the commissioner, shall be paid out of the funds of the bank in his hands."

In view of the number of banks at present in the possession of the Bank Commissioner, it appears to be an economically sound practice to conduct the general supervision and liquidation of the affairs of these banks under a central organization, utilizing a single group of expert employees, counsel and assistants, rather than singly. This procedure appears to provide a more effective supervision and a considerable saving of expense.

You have informed me that in the case of each individual bank in your possession the Supreme Judicial Court has entered the following decree: —

"This cause came on to be heard at this sitting upon the petition of the Commissioner of Banks, and waiver of notice thereon, and was argued by counsel and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the petitioner, as he is Commissioner of Banks, be and he is hereby authorized and empowered to pay out of the funds of the respondent in his hands the routine expenses incident to the conduct of the affairs of and the supervision and liquidation of said respondent in his possession, and from time to time to pay to agents and counsel serving the respondent, reasonable amounts on account of compensation for services rendered and expenses incurred, said payments to be subject to confirmation by the court and final compensation to be subject to the approval of the court before payment thereof, all as more fully set forth in the petition."

By virtue of the provisions of G. L. (Ter. Ed.) c. 30 and of this decree you have, in my opinion, the authority to apportion the expenses of the so-called central organization among the several banks receiving services therefrom, provided that the expenses thus apportioned to each specific bank are fixed by you and are confirmed by the court in conformity with the decree referred to above.

I accordingly answer your first question in the affirmative.

Referring to your second question, the funds received by the so-called central organization by virtue of assessments or apportionments levied upon the individual banks, in my opinion, remain the property of the said banks in the possession of the Bank Commissioner to the same extent as if the Bank Commissioner held these funds as being in possession of each individual bank. These assessments or apportionments are in the nature of an advance to an agency created by the Bank Commissioner, for the purpose of supervision and liquidation of banks in his possession, to cover proper charges and expenses chargeable to each individual bank. Such funds are not "money received on account of the commonwealth," within the meaning of Mass. Const. Amend. LXIII, § 1, and the provisions of G. L. (Ter. Ed.) c. 30, § 27.

I accordingly answer your second question in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Constitutional Law — Intoxicating Liquor — Importation — Citizen.*

The provisions of G. L. (Ter. Ed.) c. 138, §§ 2 and 18, as inserted by St. 1933, c. 376, § 2, are unconstitutional in so far as they purport to prohibit all importation of intoxicating liquor by a citizen of Massachusetts for his personal use and that of his family and guests.

FEB. 1, 1934.

*Alcoholic Beverages Control Commission.*

GENTLEMEN: — You have in effect asked my opinion as to whether a citizen of Massachusetts, who has not a wholesaler's or importer's license to import, may legally import intoxicating liquor for his own personal use and that of his family and guests, in view of the provisions of G. L. (Ter. Ed.) c. 138, §§ 2 and 18, as inserted by St. 1933, c. 376, § 2.

Said section 2 provides: —

"No person shall manufacture, with intent to sell, sell or expose or keep for sale, transport, import or export alcoholic beverages or alcohol, except as authorized in this chapter; . . ."

Said section 18, after providing for the issuance of licenses to sell as wholesalers and importers, further provides: —

"In order to ensure the necessary control of traffic in alcoholic beverages for the preservation of the public peace and order, the shipment of such beverages into the commonwealth, except as provided in this section, is hereby prohibited."

No provision is made in the statute for permitting such a citizen of this Commonwealth to import liquor for his personal use, purchased from a dealer in another State or abroad, and such importation is prohibited by the provisions of sections 2 and 18 above quoted.

The question is whether these provisions of the statute are unconstitutional as being an unauthorized interference with interstate commerce. The regulation of commerce among the several States and with foreign countries is a power vested solely in the Congress of the United States (U. S. Const. art. I, § 8).

If these provisions which are restrictions upon interstate commerce may be upheld, it can only be under the so-called Webb-Kenyon Act or under the Twenty-first Amendment to the United States Constitution. It is clear that prior to the enactment of the Webb-Kenyon Law these restrictions would have been unconstitutional. In *Scott* v. *Donald*, 165 U. S. 58, it was held that (p. 101) —

". . . when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of the other States."

See also *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438.

The Webb-Kenyon Act, 37 U. S. Stat. at L., pt. 2d, c. 90 (p. 699), enacted March 1, 1913, is as follows: —

"An Act divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the shipment or transportation, in any manner, or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

This statute does not purport to delegate to the States the power to prohibit importation of liquor; but itself prohibits importation in cases where such liquor is intended to be received or used contrary to the State laws. The Webb-Kenyon Act, accordingly, seems to furnish the Com-

monwealth of Massachusetts with no authority to enact the provisions against importation here in question.

Moreover, the purpose of the Webb-Kenyon Act was to aid the so-called dry States in enforcing prohibition, or "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 324. It was not the purpose of the act to enable a State, whose law permits the general sale and use of intoxicating liquor, to restrict interstate commerce in such liquor. The provisions of the Massachusetts statute here in question are inserted in a statute passed for the purpose of authorizing, instead of prohibiting, the sale of intoxicating liquor. These provisions permit a citizen to purchase foreign-made liquor for personal use from a dealer within the State, but prohibit commerce between such a citizen and a dealer in another State or country. This is in conflict with the law as stated by the United States Supreme Court in *Scott* v. *Donald*, above referred to. The Webb-Kenyon Act did not have the effect of repealing all the law relating to interstate commerce. It changed that law only to the extent necessary for the purposes in view. *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, 199. That being so, the statement of the law above quoted from *Scott* v. *Donald*, in my opinion, still stands. Under that statement the provisions in the Massachusetts statute prohibiting importation are invalid.

There seems to be nothing inconsistent with this view in *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, *supra*, or in any other case which has come to my attention. In the Clark Distilling case the State statute prohibited the manufacture or sale of intoxicating liquor *within* the State and the transportation of liquor *within* the State, and the receipt and possession of liquor so transported. The prohibition, as the court points out, was upon acts performed within the State, and in no way was more burdensome upon interstate than upon intrastate commerce.

Nor, in my opinion, is the situation changed by the Twenty-first Amendment to the United States Constitution. Section 2 of the amendment is as follows: —

"The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

This provision, although more concise, is in substance and form the same as the Webb-Kenyon Act. Like the Webb-Kenyon Act, the amendment does not purport to delegate to the States the power to prohibit imports but itself imposes such prohibition in the cases specified, namely, where the delivery or use within a State is in violation of the laws thereof. The purpose of the amendment is no different from that of the Webb-Kenyon Act. The reason for inserting the provision in the Constitution was to remove the protection afforded the so-called dry States by the Webb-Kenyon Act from the hazard of legislative change.

In reference to the meaning of the Webb-Kenyon Act the United States Supreme Court has said, in *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, 199: —

"It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of

the statute operative only where the liquor is to be dealt with in violation of the local law of the State into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intended that they shall be possessed, sold or used in violation of any law of the State wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the State to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

This statement of the United States Supreme Court in construing the Webb-Kenyon Act seems equally applicable to the constitutional amendment, which is cast in the same form as the act and was drafted for the same purpose.

In my opinion, the provisions against importation contained in sections 2 and 18 of G. L. (Ter. Ed.) c. 138, as inserted by St. 1933, c. 376, § 2, are invalid in so far as they prohibit all importation of intoxicating liquor by a citizen of Massachusetts for his personal use and that of his family and guests, inasmuch as they violate the provisions of the Federal Constitution with relation to interstate and foreign commerce.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Insurance — Policy — Approval.*

The Commissioner has no authority to approve a policy, supplementary to a life policy, which provides for additional special benefits to the holder consequent upon the death of the insured.

FEB. 2, 1934.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have laid before me a contract of insurance called "Child's Protection Supplementary Policy" and have advised me in effect that heretofore it has not been your practice to approve similar supplementary contracts, "on the ground that the approval of such contracts does not seem to be authorized by the statutes." You have asked me if, in my opinion, you are authorized to approve the said "supplementary policy."

I am of the opinion that the practice which you state you have been following is correct, and that you are not authorized to approve the instant "supplementary policy."

The power of the Commissioner of Insurance to approve policies supplementary to original life policies is contained in G. L. (Ter. Ed.) c. 175, § 24, which section reads: —

"Any life company, whether or not it is authorized to transact accident and health insurance under clause sixth of section forty-seven, may provide in its policies of life, group life or endowment insurance, issued in compliance with this chapter, for the payment of an accidental death benefit consisting of a larger amount if death is caused by accident than if it results from other causes, and may incorporate therein or in its annuity

or pure endowment contracts, issued in like compliance, provisions for the waiver of premiums or for the granting of special benefits in the event that the insured, or either of them, or the holder, as the case may be, becomes totally and permanently disabled from any cause. Such provisions shall state the special benefits to be granted thereunder, the cost thereof to the insured or to the holder and shall define what shall constitute total and permanent disability. The consideration for any benefits granted under this section shall be stated separately in the policy or contract.

Any such company may, in conjunction with and supplementary to any policy of life, group life or endowment insurance or annuity or pure endowment contract, issue a separate policy providing solely for any or all of the benefits permitted by this section. No such separate policy shall be issued or delivered in the commonwealth until a copy of the form thereof has been on file for thirty days with the commissioner, unless before the expiration of said thirty days he shall have approved the form of the policy in writing; nor if the commissioner notifies the company in writing, within said thirty days, that in his opinion the form of the policy does not comply with the laws of the commonwealth, specifying his reasons therefor; provided that such action of the commissioner shall be subject to review by the supreme judicial court.

The provisions of section one hundred and eight shall not apply to any policy of life, group life or endowment insurance or annuity or pure endowment contract or separate policy or contract providing for any or all of the benefits permitted by this section."

This power of approval is limited by said section to the approval of supplementary policies "providing *solely* for any or all of the benefits permitted by this section" (said section 24). The benefits permitted by the said section are enumerated in the first paragraph thereof and consist of (1) payment of an accidental death benefit consisting of a larger amount if death is caused by accident than if it results from other causes, and (2) waiver of premiums or granting of special benefits consequent upon the total and permanent disablement of the insured or the holder of the original policy.

The benefits provided by the instant supplementary contract consist not in a waiver of premiums or in other payments or benefits *consequent upon total and permanent disablement*, but consist in a waiver of premiums *consequent upon death*. "Death" and "total and permanent disablement," as those words are used in G. L. c. 175, are not synonymous.

G. L. (Ter. Ed.) c. 175, § 132, relative to the approval of policies, contains no grant of authority to you which would authorize your approval of the instant "supplementary policy," and I find no other provision of the statutes which would do so.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Department of Labor and Industries — Rules — Municipal Building.*

FEB. 14, 1934.

HON. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — You request my opinion as to whether sections 2 (1) and 3 (1) of the rules of the Department of Labor and Industries, relating to

structural painting, apply to painting done by a city hospital, through one of its employees, upon a building occupied by it.

Said sections of the rules are as follows: —

"SECTION 2. (1) No person or firm shall employ any person in any structural painting operation in connection with which any rigging is used unless a written statement, containing a list of all rigging so used, has been filed with the Department within the year ending on the date of such operation."

"SECTION 3. (1) Every person or firm employing one or more persons in any structural painting operation in connection with which any rigging is used shall employ at least one person qualified as a painter's rigger by having satisfactorily passed an examination prescribed by the Department, unless the employer or a member or officer of such firm is so qualified."

In my opinion, these rules have no application to the specific work to which you refer, inasmuch as the same is being carried on by a city hospital.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Hours of Labor — Contract — Federal-Aided Projects.*

The eight-hour per day restriction in G. L. (Ter. Ed.) c. 149, § 30, embodied in a contract with the Commonwealth, must be observed by contractors even if the work is subject to the National Industrial Recovery Act.

FEB. 15, 1934.

*Emergency Public Works Commission.*

GENTLEMEN: — You request my opinion as to whether laborers employed under contracts made by the Commonwealth in connection with projects under the National Industrial Recovery Act and St. 1933, c. 365, may work for ten hours per day, not exceeding thirty hours per week, provided that such hours "meet with the approval of the Federal authorities."

G. L. (Ter. Ed.) c. 149, § 30, restricts the services of all laborers, workmen and mechanics employed by any contractor upon any works of the Commonwealth to eight hours in any one day and to forty-eight hours in any one week, except in cases of extraordinary emergency; and a provision so restricting the hours of labor has been inserted in the contracts to which you refer.

Section 206 of the Industrial Recovery Act provides that all contracts let for construction projects shall contain a provision that "so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week"; and a provision to the same effect, prescribed by the Federal Emergency Administration of Public Works (created by the President of the United States under authority of section 201A of the Industrial Recovery Act), reads as follows: —

"(*b*) *Thirty-hour week.* — Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government Engineer, no individual directly employed on the project shall be permitted to work more than 30 hours in any 1 week: *Provided,* That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

This provision shall for the purposes of this contract supersede the terms of any code adopted under title I of the National Industrial Recovery Act."

This provision has also been inserted in the contracts to which you refer.

In my opinion, the eight-hour per day restriction imposed by G. L. (Ter. Ed.) c. 149, § 30, and incorporated as a term of the contracts is effective and must be observed by the contractors. The Federal government has neither by statute nor by rules promulgated by the Federal Emergency Administration of Public Works made any provision inconsistent therewith.

It is provided in section 2 of St. 1933, c. 365, that —

"Such projects, so approved, shall be carried out in all respects subject to the provisions of said Title II (of the National Industrial Recovery Act) and to such terms, conditions, rules and regulations, not inconsistent with applicable federal laws and regulations, as the commission may establish, with the approval of the governor, to ensure the proper execution of such projects."

I understand from your reference to "the approval of the Federal authorities" that you mean merely that some representative of the Federal government overseeing the work is willing that the contractor should employ men for ten hours per day. I do not understand that any regulation has been adopted by the Federal Emergency Administration of Public Works supplementing the thirty-hour week provision, above referred to, in respect to hours of labor per day, or that your Commission has established any rule permitting employment for ten hours.

Of course, if an extraordinary emergency is found to exist requiring ten hours per day labor on some particular contract, the eight-hour restriction contained in G. L. (Ter. Ed.) c. 149, § 30, is by the terms of that section inapplicable. I do not understand from your question that either the Federal authorities or your Commission considers that such an emergency exists.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Contract for Public Work — Bond — Preferences.*

Under the terms of the bond given to secure contracts for public work laborers and materialmen are given priority in action thereon.

FEB. 23, 1934.

*Emergency Public Works Commission.*

GENTLEMEN: — You have submitted to me copies of the following: —

Letter dated January 31, 1934, to all State engineers, signed Harold L. Ickes, Administrator;

Form of labor bond referred to in said letter of January 31, 1934; and

Letter of February 14, 1934, to you from Harold R. Gow, State Engineer P. W. A., by Frank E. Lenane, Executive Assistant.

You request my opinion as to whether or not the bond required with State contracts for construction is written primarily for the benefit of laborers and materialmen and gives them the first right of action on the bond.

In the letter of February 14, 1934, from Mr. Gow, quoting, in part, from a letter received by him from the Administrator's office at Washington, "If the bond usually required is written primarily for the benefit of laborers and materialmen, giving them the first right of action on the bond, a separate labor bond need not be written," Mr. Gow concludes: "Therefore it will be necessary for the contractor to furnish a separate labor bond."

I respectfully disagree with that conclusion of the State Engineer P. W. A., and am of the opinion that a bond in the form of the bond now accompanying our State contracts does give the first right of action to laborers and materialmen. My opinion is based upon the conclusion of the court in the case of *J. H. McNamara Inc.* v. *McGuire*, 254 Mass. 589. In that case claims against the contract were filed by various laborers and materialmen. The bond was sufficient to pay those claimants in full if the city was not permitted to enforce a claim which it had under the same bond, but the amount was insufficient in a large amount if the city shared and had priority. The amount also was insufficient if the city and the lienors shared pro rata in the amount recovered. The decision in that case reads, in part, as follows (p. 594): —

"There has been a breach of the bond. The question is, to whose benefit the recovery enures. The Legislature cannot have intended that the person upon whom it placed the duty to secure 'sufficient security' for the payment 'for labor performed or furnished and materials used' should be permitted so to use that security for his own benefit as to render it insufficient for the payments for labor and material. The law will not permit it. Where the law requires one person to obtain security for the benefit of others, that person cannot himself share in it until those for whom he is bound to obtain it have had the full benefit intended to be secured to them.

The city contends that it cannot be responsible if its officials take security which proves to be insufficient. This is aside from the point. The point is that the city cannot render what has been obtained as security under the statute insufficient by taking so much for itself that the remainder falls short of satisfying the statutory beneficiaries.

The decision in *Friedman* v. *County of Hampden*, 204 Mass. 494, that lienors took precedence of any assignment by the contractors, supports this position.

The decree, therefore, is right in so far as it determines that the surety is liable to the claimants, and that the latter take priority to the city in their claims against the surety."

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*City — Sale of Firearms — License.*

A license to purchase a revolver is not required in connection with the sale of such a firearm to a municipality.

FEB. 24, 1934.

Brig. Gen. DANIEL NEEDHAM, *Commissioner of Public Safety.*

DEAR SIR: — You have asked my opinion upon the following question relative to the purchase of revolvers by a municipality: —

"An opinion is requested as to the right of a municipality to purchase firearms under the following conditions:

A municipality purchases a revolver at a store, not to be given to any particular individual, but to become the general property of the town. One such revolver was purchased by the chairman of a board of selectmen. Is such a purchase and sale in violation of G. L. (Ter. Ed.) c. 140, §§ 121–131B, inclusive?

. . . Of course, a city or town cannot be given a license to carry, and therefore it would appear that the only authority for the purchase in question would be under the wholesale clause of section 121. . . ."

A sale of a revolver to a city or town is not a sale at "wholesale," within the meaning of the last sentence of G. L. (Ter. Ed.) c. 140, § 121, which excepts sales so made from the regulations upon sales of firearms contained in sections 122–129 of said chapter 140. A municipality as such has no power to engage in the business of buying firearms for the purpose of resale; which purpose is of the essence of a "wholesale" transaction, as the words are used in said section 121.

Chapter 140 provides, by sections 122–131A, inclusive, for the issuance of a license to sell firearms, including revolvers, one of the conditions of which is that the licensee will not sell to a person who has not a permit to purchase; and also provides for the granting of a license by designated authorities to a "person" to purchase, provided such "person" is one qualified to be granted also a license to carry a revolver, the issuance of which under certain conditions is provided for.

No mention is made in our statutes relative to sales of revolvers or other firearms to cities or towns. Such municipalities are not comprehended by the use of the word "person" or "persons" in the said sections. There appears to be no prohibition upon the sale of revolvers to such municipalities by licensed dealers. It would seem that the conditions of the license to sell, prescribed in section 123 of said chapter 140, have no application to sales to municipalities, in so far as their requirements are inapplicable to a transaction with a customer of such a type.

The Legislature may well have thought that the exercise of the police power, as set forth in the above-mentioned sections, was not such as should properly be extended to cities and towns, which, as political subdivisions exercising some measure of the sovereign power, should not be restricted in the purchase of necessary weapons for civic protection. In any event, the General Court has not in any of our statutes employed language denoting an intention to subject such municipal bodies to those regulations which it, exercising the police power of the Commonwealth, has imposed upon individuals with relation to the purchase of revolvers.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Pharmacist — Alien — Alcoholic Beverages.*

A registered pharmacist who is an alien may sell alcoholic beverages upon prescription only.

MARCH 5, 1934.

HON. JAMES M. HURLEY, *Commissioner of Civil Service.*

DEAR SIR: — You request my opinion upon the following question: —

"Can a druggist who was registered previous to the law requiring that a registered pharmacist be a citizen, and who is still an alien now conducting

a drug business, be issued a certificate of fitness under G. L. (Ter. Ed.) c. 138, § 30, as inserted by St. 1933, c. 376, § 2?"

G. L. (Ter. Ed.) c. 112, § 24, provides that a person who desires to do business as a pharmacist may be examined by the Board of Registration in Pharmacy and, if found qualified, shall be registered as a pharmacist and shall receive a certificate of such registration. By an amendment to said section 24, made in 1924 (St. 1924, c. 53), it is provided that —

"No certificate shall be granted under this section uniess the applicant shall have submitted evidence satisfactory to the board that he is a citizen of the United States."

G. L. (Ter. Ed.) c. 138, § 29, as inserted by St. 1933, c. 376, § 2, provides that a registered pharmacist who holds a certificate of fitness under section 30 may use and sell alcohol and, upon prescription, sell alcoholic liquors. Section 30 reads, in part, as follows: —

"The board of registration in pharmacy may, upon the payment of a fee of not more than five dollars by a registered pharmacist who desires to exercise the authority conferred by section twenty-nine, issue to him a certificate of fitness, which shall not be valid after one year from its date, stating that in the judgment of said board he is a proper person to be intrusted with such authority and that the public good will be promoted by the granting thereof. . . ."

An alien who was registered prior to the amendment of 1924 is a "registered pharmacist," and therefore under the terms of section 30 of said chapter 138, as amended, the Board seems to be authorized to issue to him a certificate of fitness, provided that in the judgment of the Board he is a proper person and the public good will be promoted.

This conclusion does not appear to be affected by the provisions of sections 26 and 31 of said chapter 138, as amended. Section 26 provides that no "license" for the sale of alcoholic beverages shall be issued to any person who is not a citizen of the United States. Although section 26 would prevent a registered pharmacist who is not a citizen from obtaining a license to sell without a prescription (such as a registered pharmacist who is a citizen may obtain under section 30A), it does not affect the right of a registered pharmacist to sell only upon prescription, because section 29 authorizes him to do that without a license, provided he has a certificate of fitness. Section 31 provides that no person except a citizen shall be "employed" to sell, serve or deliver any alcoholic beverages. I do not understand that your question refers to a registered pharmacist who is employed by any one, and, accordingly, section 31 has no application.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Insurance — Reduction of Par Value of Shares of a Company — Certificate.*

The Commissioner of Insurance may not approve a certificate of the proceedings of an insurance company reducing the par value of shares under G. L. (Ter. Ed.) c. 175, § 71, when such reduction was authorized as of a date prior to the meeting granting such authorization.

MARCH 7, 1934.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — In a recent communication to me you have set forth the text of G. L. (Ter. Ed.) c. 175, § 71, which, in its applicable parts, reads as follows: —

"Any company may, upon a vote of a majority of the stock represented at a meeting legally called for that purpose, reduce its capital stock by decreasing the number of the shares thereof, or by reducing the par value of its shares to an amount not less than five dollars without changing the number thereof; . . . Within ten days after such meeting, the company shall submit to the commissioner a certificate setting forth the proceedings thereof, the method of reduction and the amount thereof and of the assets and liabilities of the company, signed and sworn to by its president, secretary and a majority of its directors. If the commissioner finds that the reduction is made in conformity to law and that it will not be prejudicial to the public, he shall endorse his approval thereon and, except as hereinafter otherwise provided, upon filing the certificate, so endorsed, with the state secretary and paying a fee of twenty-five dollars for the filing thereof, the company may transact business upon the capital as reduced, and the commissioner shall, upon payment of the fee prescribed by section fourteen, issue his certificate to that effect. . . ."

With relation thereto you have advised me of the following facts: —

"A domestic company has submitted to the Commissioner a certificate setting forth the record of a stockholders' meeting called for the purpose of reducing the par value of its shares. This meeting was held February 21, 1934, and the said stockholders at that meeting voted to reduce the par value of the shares as of December 30, 1933. It appears from the record filed with me that this reduction in the par value of the company's shares has been made in conformity with the law unless the fact that it was made on February 21, 1934, as of December 30, 1933, does not conform to the statute. The company requests my approval of the proceedings in accordance with the statutory provision above mentioned."

You ask my opinion in connection with such facts upon the following question of law: —

"Is the Commissioner of Insurance authorized to approve the certificate setting forth the proceedings reducing the par value of the shares of a corporation under said section 71 as of a date prior to the day upon which the stockholders voted to make such reduction?"

I answer your question in the negative. The entire context of said section 71 indicates an intention on the part of the Legislature that the finding of the Commissioner that the stock reduction "is made in conformity to law and that it will not be prejudicial to the public" and his

subsequent endorsement of the proceedings of the company, predicated upon such finding, shall be a prerequisite to the transaction of the business of the company upon the basis of a reduced capital. To permit a company to reduce its capital stock now, to be effective as of some past date, and to require the approval of the Commissioner *nunc pro tunc* is not within the meaning of section 71 as enacted by the General Court. Such a course to some extent would virtually annul the safeguards which the Legislature has deliberately thrown about the doing of business on a reduced capital.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Insurance — Optional Annuity Settlements — Policy.*

The Commissioner of Insurance may not approve a policy form which provides an option for payment of a life policy as an annuity without setting forth a table showing the amounts of the annuity payments. (See *Metropolitan Life Ins. Co.* v. *Commissioner of Insurance*, Mass. Adv. Sh. [1935] 363.)

MARCH 19, 1934.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have advised me of the following facts: —

"The Metropolitan Life Insurance Company has filed for my approval in accordance with the provisions of G. L. (Ter. Ed.) c. 175, § 132, a policy form containing the following clause:

'Option 4. (Annuity Settlement.) By the payment of a life annuity under any form of single payment life annuity issued by the company at the date such life annuity settlement is elected. The amount of annuity shall be such as the amount retained by the company will purchase on the basis of the net rates corresponding to the gross rates in effect for similar forms of annuity at the time the option is elected. If this option is elected prior to the time any amount is payable under the terms of this policy, a copy of the election form will be furnished by the company for attachment to this policy. Such election form will contain a description of the annuity elected and a table of rates for such form of annuity.'

In its letter accompanying the policy the company states: —

'This option provides for the election of a life annuity under any form of single payment life annuity issued by the company at the date such annuity settlement is elected, on the basis of the net rates corresponding to the gross rates in effect for similar forms of annuity at the time the option is elected. Since the rates at which the annuity is to be purchased do not determine until the option is elected, which time may be a good many years after the policy is issued, it is impossible to show a table of these rates in the policy. In the case of the proposed new option, it is merely the purpose to give the insured or beneficiary the opportunity to select other options which may be more advantageous or which may better suit the individual needs at some future time than the options for which tables are set out in the policy. It is manifestly impracticable to include tables showing every option which the company may be willing to offer. The advantage to the insured specifically in having this Option 4 in the contract is that it provides a wide range of selection and sets forth in advance that such options may be obtainable at net rates, rather than

the gross rates which would be charged a purchaser other than a policyholder or his beneficiary electing an annuity under this option. The basis, therefore, by which the amount payable under any option may be determined is established in advance, but when the option is elected and it is provided that the proceeds of the policy shall be (are) payable as an annuity, a table of the annuity payments will be attached to the policy.'"

With relation to the foregoing you have asked me as follows: —

"Is the Commissioner of Insurance authorized to approve a policy containing the aforesaid option?"

I answer your question in the negative.

G. L. (Ter. Ed.) c. 175, § 132, provides that no policy of life insurance shall be issued which does not contain the following clause: —

"10. In case the proceeds of a policy are payable in instalments or as an annuity, a table showing the amounts of the instalments and annuity payments."

It is stated that the instant policy does not, in relation to the annuity above set forth, in which it is payable, contain any "table showing the amounts of the . . . annuity payments." The mere fact that such payments cannot feasibly be so shown, as set forth in the letter of the insurance company to you, does not afford an excuse for failing to comply with the specific mandate of the Legislature in this respect. It would appear from the context that one object of writing the provisions of said clause 10 of section 132 into the statute law was to make certain that the assured would have before him, in advance of a choice of elections to convert, in convenient form an absolute statement of just what in the way of an annuity he could exchange his policy for. To give such information to him after instead of before his exercise of his election is an entirely different matter, and fails to comply with either the letter or the spirit of the applicable statute.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Motor Vehicle Registration — Heir.*

One to whom title to an automobile has not been transferred from the administrator of an estate, although he may be entitled so to receive it, has not yet become "an owner" in such sense that he can properly register the motor vehicle in his own name, even if he has acquired actual possession of it.

MARCH 22, 1934.

Hon. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — You have requested my opinion upon the following questions of law based on facts which you have set forth, as follows: —

"The owner of a registered motor vehicle dies intestate and the vehicle is operated without registration for the balance of the year under the provisions of the fourth paragraph of G. L. (Ter. Ed.) c. 90, § 2, . . .

At the beginning of the following year, no administration having been applied for, the vehicle is registered by a member of the immediate family of the deceased, who is sole heir, or who holds releases from the only other surviving members of the immediate family to all property of the

deceased, the purpose of the procedure being to avoid the trouble and expense of administering a small estate, in many cases consisting of only the motor vehicle in question and a few personal belongings.

Is such heir the 'owner' of the motor vehicle, within the meaning of that word as used in the first paragraph of G. L. (Ter. Ed.) c. 90, § 2, which reads, in part, as follows: —

'Application for the registration of motor vehicles and trailers may be made by the owner thereof.'"

Although the word "owner" as used in said section 2 has been construed by the Supreme Judicial Court broadly, so as to include not only the holder of the legal title to a motor vehicle but also others who have acquired what the court calls a "special property" in a motor vehicle, such as bailees, mortgagees in possession, and vendees under conditional contracts of sale (see *Harlow* v. *Sinman*, 241 Mass. 462; *Downey* v. *Bay State St. Ry.* 225 Mass. 281; *Hurnanen* v. *Nicksa*, 228 Mass. 346; *Temple* v. *Middlesex & Boston St. Ry. Co.*, 241 Mass. 124), nevertheless the court has not construed the word so broadly as to cover one who has not lawfully acquired at least some "special property" interest in the vehicle. An interest, special or general, in the property of a deceased can be lawfully acquired only by transfer from a legal representative of his estate; that is, an executor or administrator. The "heir," as described in your statement of facts, had not so acquired any interest in the motor vehicle formerly belonging to the deceased. He had at most only an expectancy or hope that if there had been an executor or administrator, and if all conditions and the rights of creditors had been favorable thereto, such legal representative might have transferred the ownership of the vehicle to him. Such a hope or expectancy, with relation to a motor vehicle, cannot well be said to make the possessor thereof an "owner" of such vehicle, under any reasonable interpretation, however broad, of the word "owner" as used in the instant statute.

I answer your question in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Department of Public Utilities — Broker's Registration — Revocation.*

Registration of a broker under the Sale of Securities Act may be revoked by proof that he has made false representations in connection with his sales of stock to persons in New Hampshire.

MARCH 28, 1934.

HON. HENRY C. ATTWILL, *Chairman, Department of Public Utilities.*

DEAR SIR: — You request my opinion as to the right of your Commission to revoke the registration of a broker under the following circumstances.

Prior to the hearing before the Director of the Securities Division the broker was notified that evidence would be offered on five specified grounds, of which the first two were that the broker had failed to furnish information as required and that he had sold in the Commonwealth stock not qualified to be sold, and of which the last three were in substance that the broker had made misrepresentations of material facts, had failed to disclose material facts, and had made representations and predictions as to the future not made honestly and in good faith. The Director made no find-

ings upon the last three specifications but found that the first two were sustained, and revoked the registration. The broker claimed a public hearing before a majority of the members of the Commission, in accordance with the provisions of section 13 of the Sale of Securities Act (G. L. [Ter. Ed.] c. 110A, as amended by St. 1932, c. 290). At this hearing evidence upon all five specifications was introduced. After hearing this evidence the Commissioners were of the opinion that the first two specifications were not sustained. Your first question, as I understand it, is whether, assuming that the evidence is sufficient to sustain one or all of the last three specifications, the Commission has power to affirm the order of the Director revoking the registration.

In my opinion, the Commission has such power. Said section 13 provides that at a hearing before a majority of the members "any evidence relevant to the subject matter involved in the proceedings . . . may be introduced"; and also that the Commission shall "reconsider and review the said subject matter." These provisions seem to show that the matter is to be heard by a majority of the Commission *de novo;* and that the fact that the Director made no finding upon a certain specification does not bar the Commissioners from affirming an order revoking a registration, if the evidence before the Commissioners upon that specification is sufficient to justify a revocation.

Your second question is whether the evidence presented to the Commissioners under specifications 3 to 5 was sufficient. You state that there is evidence to show that the broker solicited and obtained orders for the purchase of stock by persons in New Hampshire; that the stock was transferred into the purchasers' names in New York and transmitted to them in New Hampshire; that in making such solicitations the broker sent or caused to be sent to the prospective purchasers bulletins which contained representations of the broker and which were not made honestly and in good faith by him; that the broker also in telephone conversations from his office here to the prospective purchasers in New Hampshire made false representations of material facts in order to induce them to purchase the stock; and that there is no evidence that the broker circulated the bulletins in this Commonwealth or made false representations to purchasers who were in this Commonwealth.

I assume that the Sale of Securities Act does not purport to require the registration of a broker who has a place of business in this Commonwealth from which he conducts solely an interstate business. Section 9 requires registration only for persons who "sell any security within this commonwealth." But the question here is solely of the authority of the Commission to revoke the registration or license to do an intrastate business. This depends upon the construction to be given to section 12, which provides that if "any registrant is or has been conducting his business as broker or salesman in a fraudulent manner, or in a manner which if continued would result in fraud," the Commission may revoke his registration. It is also provided in section 2 (*e*) that the word "broker" "shall include" every person "who in this commonwealth engages . . . in the business of selling securities." It is, of course, arguable that the phrase "his business as a broker" must be construed as referring only to that part of a broker's business which is intrastate, and as to which he is required to be registered. But in view of the purpose of the provision requiring registration, namely, to prevent dishonest brokers from doing business here, I cannot believe that it was the intent of the Legislature so to limit the power of the Commission to revoke a registration. Dis-

honesty in connection with a broker's interstate transactions certainly bears upon his fitness to conduct intrastate transactions. An applicant for original registration must demonstrate to the Commission that he is "of good moral character and of sufficient qualifications to engage in the business proposed" (section 9). Certainly, if the Commission refused to grant a license to an applicant upon evidence that his transactions as a broker had been dishonest, no valid objection could be raised upon the ground that such transactions had been solely interstate. Clearly, the Commission ought to have the power to revoke a registration upon similar evidence, and I have no doubt that the Legislature intended that it should have. In my opinion, it is not impossible to construe the words "his business as broker," as used in section 12, as covering a broker's interstate as well as his intrastate business; and for the reasons above stated I should not construe this section otherwise unless I felt absolutely constrained by the language of the statute to do so.

It is accordingly my opinion that if your Commission is convinced by the evidence before you that the broker has made false representations in connection with his sales to persons in New Hampshire, as stated, you have authority to revoke his registration.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Retirement System — Probation Officer — Clerk of Court Pro Tem. — Court Officer.*

A probation officer who has rendered full service in his court during a period of twenty consecutive years, but who has occasionally served as a court officer, may be retired at the age of seventy.

APRIL 6, 1934.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You have asked my opinion, with relation to the retirement of a probation officer, upon the following question: —

". . . whether a probation officer who has in fact rendered full service in his court during a period of twenty consecutive years, but who has during at least a part of that period, by direction of the justice, served as a court officer and has received additional compensation for such service as a court officer, can be retired at the age of seventy under the provisions of G. L. (Ter. Ed.) c. 32, § 75."

G. L. (Ter. Ed.) c. 32, § 75, reads as follows: —

"Any probation officer or assistant probation officer whose whole time is given to the duties of his office, shall, at his request, be retired from active service and placed upon a pension roll by the court upon which it is his duty to attend, with the approval of the county commissioners of the county in which the court is situated; provided, that he is certified in writing by a physician designated by such court to be permanently disabled, mentally or physically, for further service by reason of injuries or illness sustained or incurred through no fault of his in the actual performance of his duty as such officer. Any such probation officer or assistant probation officer who has faithfully performed his duties for not less than twenty consecutive years, and who is not less than sixty, shall be

retired at his request without the aforesaid certification. Such probation officer must be retired upon attaining the age of seventy."

In an opinion rendered by a former Attorney General, VI Op. Atty. Gen. 315, 318, to which you refer, it was held that the positions of clerk of court *pro tem.* and of probation officer of the same court are not incompatible and may be held by one person, who may receive compensation for both types of service.

Inasmuch as the two offices mentioned were both properly held by the same person, it could not well be said under such circumstances that such person had ceased to give his whole time to his duties as probation officer, in the sense in which the words "whose whole time is given to the duties of his office" are used in said section 75.

The same considerations would, in my opinion, apply to a person who held the position of a court officer of a juvenile court "by direction of the justice" of such court while continuing also, and coterminously, to perform, as you state, "all the duties of an assistant and juvenile probation officer."

There is nothing in the opinion of another former Attorney General, IV Op. Atty. Gen. 576, to which you also refer, inconsistent with this view or with that expressed in VI Op. Atty. Gen. 315, for the former was predicated upon the fact that a certain probation officer had *not* given his whole time to the duties of his office but had spent a portion of it in the private practice of law.

Upon the facts which you have stated I answer your question to the effect that such a probation officer as you refer to may be retired at the age of seventy.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Insurance — Foreign Fraternal Benefit Society — Issuance of Annuity Contracts.*

A foreign fraternal benefit society transacting business on the lodge system may be admitted to do business in Massachusetts when it provides in its constitution and by-laws for the issuance to its members of annuity contracts.

APRIL 11, 1934.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have asked my opinion upon the following question of law: —

"May a foreign fraternal benefit society transacting business on the lodge system be admitted to this Commonwealth when it provides in its constitution and by-laws for the issuance to its members of annuity contracts?"

The applicable statute, G. L. (Ter. Ed.) c. 176, § 41, reads, in part, as follows: —

"No foreign society shall transact any business in the commonwealth without a licence from the commissioner. Every such society applying for such a license shall file with the commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and by-

laws, certified by its secretary or corresponding officer; a power of attorney to the commissioner, as provided in the following section; a statement of its business, on oath of its president and secretary, or corresponding officers, in the form required by the commissioner, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the commissioner; a copy of its certificate of membership; a certificate from the proper official of its home state, territory, district or country that the society is legally organized; and the society shall show that the benefits are provided for by periodical or other payments by persons holding similar contracts, and that its assets are invested in accordance with the laws of the state or country where it is organized, and that it has the qualifications required of domestic societies on the lodge system incorporated under this chapter; . . . Upon compliance with these requirements, such foreign society shall be entitled to a license to transact business in the commonwealth until July first following, and such license shall, upon compliance with this chapter, be renewed annually, but in all cases to terminate on July first following; except that it shall continue in full force and effect until the new license is issued or refused. For every such license or renewal the society shall pay to the commissioner twenty dollars."

I assume from the general tenor of your communication that the society referred to in your question has done all the acts required by said section 41 as prerequisites to obtaining a license, and that "it has the qualifications required of domestic societies on the lodge system." If this be so, it is immaterial, as far as the issuing of a license to it under said section 41 is concerned, that it has by its constitution and by-laws, in addition to "the qualifications required of domestic societies," the power to make annuity contracts with its members. If it possesses the qualifications treated as essential by the statute, the fact that it also possesses other qualifications and powers in respect to making contracts does not, of itself alone, by the terms of our statutes nor by any implication therefrom, bar it from receiving the license specified in said section 41 and from being thereby admitted to the Commonwealth (see I Op. Atty. Gen. 1; *U. S. Fidelity & Surety Co.* v. *Linehan*, 70 N. H. 395), although under our laws it will not be permitted to exercise such greater powers in respect to making annuity contracts within the Commonwealth.

I accordingly answer your question in the affirmative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Schoolhouses — City of Boston — Janitors — Custodians.*

Assistants to the custodians of schools in the city of Boston are "laborers" or "workmen" as these words are used in the applicable statute, but they are employees of the custodians and not employees of the city, so that the provisions relative to hours of work contained in G. L. (Ter. Ed.) c. 149, §§ 30 and 31, do not apply to them.

APRIL 11, 1934.

Hon. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — You request my opinion as to whether "assistants" to custodians, referred to by you as "janitors," in schoolhouses of the city of Boston are subject to sections 30 and 31 of G. L. (Ter. Ed.) c. 149, restricting work as therein specified to eight hours per day.

A "custodian" is appointed for each school by the schoolhouse custodian, subject to the approval of the school committee (School Committee Rules, §§ 125, 126, cited School Doc. No. 10 — 1929, p. 18), and is paid by the city according to a schedule of compensation for custodians (School Doc. No. 9 — 1930). Custodians have general supervision of the school premises, and their duties as to sweeping and cleaning the buildings and grounds, tending to the heating, etc., are set forth in detail in the regulations for custodians (School Doc. No. 10 — 1929). Custodians are allowed a specified number of "assistants" to do the manual work involved (School Doc. No. 8 — 1929, p. 5). These assistants are paid by the custodians out of the pay received by the custodians from the city; and the regulations refer to them as being "employed by" the custodians, and being "their employees" (School Doc. No. 10 — 1929, pp. 7, 19).

I assume that these assistants are "laborers" or "workmen" within the meaning of these words as used in sections 30 and 31 of G. L. (Ter. Ed.) c. 149 (*White's Case*, 226 Mass. 517); but these sections apply only to laborers and workmen "employed by" the city, or "by any contractor or subcontractor for or upon any public works of" the city. The assistants here in question are not, in form at any rate, employed by the city; and the provision of the rules of the school department purporting to make them employees of the custodians has, I am informed, been recognized in the administration of the Civil Service Law. These assistants are not in fact employed under civil service. Nor can a custodian be said to be a "contractor . . . for or upon any public works of" the city. He is an officer or employee of the city whose duty is to take care of certain property belonging to the city.

Accordingly, I answer your question in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Department of Correction — Penal and Reformatory Institutions.*

Institutions under the control of the Department of Correction are not required to abide by the conditions in G. L. (Ter. Ed.) c. 142, in connection with the alteration of plumbing.

APRIL 13, 1934.

HON. FREDERICK J. DILLON, *Commissioner of Correction.*

DEAR SIR: — You have requested my opinion as to whether or not the institutions under the control of the Department of Correction are required to abide by the conditions laid down in G. L. (Ter. Ed.) c. 142, in connection with the alteration of plumbing fixtures in the said institutions. The particular case referred to deals with the Reformatory for Women, at Sherborn.

By virtue of the provisions of G. L. (Ter. Ed.) c. 125, the management and direction of the State penal and reformatory institutions are placed under the general supervision of the department and the particular supervision of the head of each institution. G. L. (Ter. Ed.) c. 125, § 33, in providing for the Reformatory for Women reads, in part, as follows: —

"The superintendent . . . shall have the management and direction of the reformatory, its servants and employees and all its affairs, except as otherwise provided."

G. L. (Ter. Ed.) c. 142, contains the law in respect to supervision of plumbing. It provides in section 11 that —

". . . said inspectors of plumbing shall inspect all plumbing in process of construction, alteration or repair for which permits are granted within their respective cities and towns."

Section 13 of said chapter 142 provides that each city and town shall adopt regulations or by-laws which shall provide that "no plumbing shall be done, except to repair leaks, without a permit first being issued therefor, upon such terms and conditions as such cities or towns shall prescribe."

The Legislature has intrusted the management and direction of all affairs of State penal and reformatory institutions to the Department of Correction and its officers. In carrying out such management and direction the officers of the department act as the agents of the Commonwealth, and are exercising domination over property of the Commonwealth. The general law made for the regulation of citizens in regard to the inspection and licensing of plumbing must, under general principles of statutory interpretation, be held to be subordinate to the special statute placing in your department complete jurisdiction over the management and direction of these institutions and the regulation of the use of this State property, unless there is express provision to the contrary. No such special provision to the contrary is to be found in the applicable statute. It is not to be assumed that in the absence of such a special provision the Legislature intended to give to the local licensing or inspecting officials authority to control or interfere with the reasonably necessary efforts of the officers of your department to perform their duty as agents of the Commonwealth. *Teasdale* v. *Newell & Snowling Construction Co.*, 192 Mass. 440, 443; I Op. Atty. Gen. 290; II *ibid.* 56 and 399; Attorney General's Report, 1932, p. 86.

I accordingly answer your question in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Trapping — Poison.*

The use of capsules containing poison, made to be affixed to steel traps, is not in violation of the law.

APRIL 16, 1934.

HON. SUMNER A. YORK, *Commissioner of Conservation.*

DEAR SIR: — You request my opinion as to whether the use of certain capsules or metal tubes containing calcium cyanide, made to be affixed to steel traps, is a violation of G. L. (Ter. Ed.) c. 131, § 103, which provides that —

"Whoever places poison in any form whatsoever for the purpose of killing any mammal or bird shall be punished . . ."

According to the claim of the manufacturer of the capsules an animal caught in the trap will immediately bite into the capsule, which is clamped onto the free jaw of the trap, and this will liberate a gas which will kill the animal.

An argument has been made, in behalf of those who desire that the use of the capsules be permitted, that an animal caught in a trap is no longer *ferae naturae* but is the property of the trapper. But however that may be, section 1 of said chapter 131 defines "mammals" as "wild or undomesticated mammals"; and, in my opinion, these words are incapable

of being construed in a sense which will make them cease to be applicable to an animal the instant it is caught in a trap.

I answer your question in the affirmative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Pharmacist — Alcoholic Beverages — Transportation — Licenses.*

A druggist licensed to sell alcoholic beverages is entitled to obtain a transportation permit, and he may transport such beverages; but he may not lawfully transport alcoholic beverages prior to the execution of the certificate of the purchaser, provided for in G. L. (Ter. Ed.) c. 138, § 30E, as inserted by St. 1933, c. 376, § 2.

APRIL 18, 1934.

*Board of Registration in Pharmacy.*

GENTLEMEN: — You request my opinion —

1. As to whether a druggist licensed to sell alcoholic beverages may obtain a transportation permit under section 22 of G. L. (Ter. Ed.) c. 138, as inserted by St. 1933, c. 376, § 2, and may make deliveries thereunder; and

2. Whether, assuming that a druggist has such a transportation permit, he may lawfully transport for delivery alcoholic beverages upon order, notwithstanding the certificate of the purchaser, provided for in section 30E of said chapter 138, as inserted by St. 1933, c. 376, § 2, has not previously been executed, if the druggist or his agent takes the book referred to in section 30E, of which the certificates are a part, to the place of delivery for execution by the purchaser there.

1. Section 15 of said chapter 138, as inserted by St. 1933, c. 376, § 2, provides generally for the granting of licenses for the sale of alcoholic beverages not to be drunk on the premises.

Section 22 provides: —

"Licensees for the sale of alcoholic beverages may transport and deliver anywhere in the commonwealth alcoholic beverages lawfully bought by or lawfully sold by them, in vehicles operated under the control of themselves or of their employees; provided, that the owner of every such vehicle shall have obtained for such vehicle from the commission a vehicle permit for the transportation of alcoholic beverages."

Section 29 of said chapter 138, as amended, provides for the sale upon prescription by registered pharmacists who hold certificates of fitness, and also provides: —

"Nothing in this chapter shall disqualify a registered pharmacist from being licensed under section fifteen, provided that he sells no cooked food to be consumed on the premises; but a license issued to a druggist under said section shall not be included in computing the number of licenses that may be granted in any city or town as provided in section seventeen."

Section 30A of said chapter 138, as amended, provides that a registered pharmacist may be "licensed by local licensing authorities to sell alcoholic liquors for medicinal, mechanical or chemical purposes without a physician's prescription, . . ."

Section 30B provides: —

"No license for the sale of alcoholic liquors, except as provided in the preceding section or as permitted in section twenty-nine, shall be granted to retail druggists."

I assume that the license to which your question refers is one issued under section 30A. In my opinion, a druggist holding such a license is one of the "licensees" referred to in section 22, and therefore entitled to obtain a transportation permit and to transport thereunder.

2. Section 30E requires every retail pharmacist licensed under section 30A to keep a book in which he shall enter, "at the time of every such sale, the date thereof, the name of the purchaser, the kind, quantity and price of said liquor, the purpose for which it was sold, and the residence by street and number, if any, of said purchaser."

Section 30D provides that no retail pharmacist licensed under section 30A shall "sell alcoholic liquor . . . except upon the certificate of the purchaser, which shall state the use for which it is wanted, and which shall be immediately cancelled at the time of sale in such manner as to show the date of cancellation."

The form of certificate is set forth in section 30E and reads: "I wish to purchase and I certify . . ."

Section 32 provides that all sales under said section 15, where transportation and delivery are required, shall be made only upon orders actually received at the licensed place of business prior to the shipment thereof.

Section 30F provides: —

"The book, certificates and prescriptions provided for in the two preceding sections shall at all times be open to the inspection of the board of registration in pharmacy, the local licensing authorities, to the inspection of the aldermen, selectmen, board of public welfare, sheriffs, constables, police officers and justices of the peace."

Section 15 provides: —

"Any sale of such beverages shall be conclusively presumed to have been made in the store wherein the order was received from the customer."

In the case put in your question the druggist would be transporting liquor which had not been sold — for there can be no legal sale prior to the signing of the certificate by the prospective purchaser — for the purpose of making a sale elsewhere than at his store. In my opinion, such procedure is contrary to the intent of the statute as disclosed in the sections above cited. Especially it is to be noted that such procedure involves removing the book from the store, which is inconsistent with the requirement of section 30F that it shall at all times be open to inspection.

Accordingly, I answer your second question in the negative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

*Retirement System — Accidental Injury — Death — Pension.*

April 18, 1934.

Hon. Charles F. Hurley, *Chairman, State Board of Retirement.*

Dear Sir: — You have requested my opinion upon the proper interpretation of G. L. (Ter. Ed.) c. 32, § 2 (9) and (10), in the following connection: —

"A short time ago the Board retired an employee for permanent accidental injury, under paragraph (9) of G. L. c. 32, § 2, and this employee recently died and the widow is now seeking a pension under paragraph (10) of said section.

The Board desires your opinion upon the question of whether a pension may be granted under paragraph (10) to the widow of a former member who was retired by the Board under paragraph (9)."

Assuming that the employee, the former member of the retirement system, to whom you refer, died from injuries received while in the discharge of his duty, I am of the opinion that his widow is entitled to the pension described in said paragraph (10), irrespective of the fact that such employee had been in receipt of the retirement allowance provided by said paragraph (9) for one found to have been permanently incapacitated.

G. L. (Ter. Ed.) c. 32, § 2 (9) and (10), reads as follows: —

"(9) Any member who is found by the board, after examination by one or more physicians selected by the board, to have been permanently incapacitated, mentally or physically, by injuries sustained through no fault of his own while in the actual performance of his duty, from the further performance of such duty, may be retired, irrespective of age and of his period of service, and shall receive yearly payments as follows: (*a*) an annuity at his age nearest birthday, as provided by section five (*2*) *B;* (*b*) such a pension from the commonwealth that the sum of the annuity under section five (*2*) *B* (*a*) and the pension shall equal one half the annual salary received by him at the time when the injury was received. Except as otherwise provided, a person retired under this paragraph shall not receive from the commonwealth any other sum by way of annuity, pension or compensation. In case of emergency, a retired officer or inspector of the department of public safety or a retired permanent member of the metropolitan district police may be called upon by the proper authority for such temporary active duty as such officer or inspector is able to perform, and there shall be paid to him for such service the difference between the rate of full pay and the rate of pension received by him. Application for disability retirement hereunder shall be made in writing within two years after the date of the applicant's last salary payment, and pension and annuity payments granted under this paragraph shall be payable only from the date of receipt by the board of such application. The board may require re-examinations from time to time of any member of the association pensioned under this paragraph or under paragraph (8), and if the disability or incapacity is found no longer to exist the pension shall cease and there shall be refunded to such member such sum, if any, as the board finds then remaining to his credit in the annuity fund.

(10) If any member is found by the board to have died from injuries received while in the discharge of his duty, and leaves a widow, or if no

widow any child or children under the age of sixteen, a pension equal to the retirement allowance to which such member would have been entitled under paragraph (9) had he been permanently incapacitated shall be paid to such widow so long as she remains unmarried, or for the benefit of such child or children so long as he or any one of them continues under the age of sixteen. A person receiving a pension under this paragraph shall not receive from the commonwealth any other sum by way of annuity, pension or compensation."

The provisions of paragraphs (9) and (10) were added to the law relative to the retirement system in 1921 (St. 1921, c. 487, §§ 4, 5), and together set forth a method of providing for members and their dependents, respectively, when such members are injured in the course of the performance of their duty so seriously as to be totally incapacitated or killed. If a member is totally incapacitated, the amount of his retirement allowance and the method of dealing with it are regulated by paragraph (9). If a member is killed, paragraph (10) in effect extends the benefits of the retirement system laws so as to afford protection to his widow and orphans by a general pension scheme applicable to them. The language of paragraph (10) does not indicate an intent to exclude from this general scheme for the protection of such widows and orphans those whose husbands or fathers have received some benefit from the provisions of paragraph (9) by way of a retirement allowance. The phrase used in paragraph (10) to indicate the amount of the pension, namely, "equal to the retirement allowance to which such member would have been entitled under paragraph (9) had he been permanently incapacitated," while more aptly describing the amount of such pension in those cases where the husband dies before receiving a total incapacity retirement allowance, is, nevertheless, descriptive of such amount in any case, and does not negative the intent of the Legislature to provide a general scheme for the care of widows and orphans of members of the system killed by injuries received in the line of duty.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Workmen's Compensation — Municipalities — E. R. A. Projects.*

A municipality is without authority to appropriate and pay public moneys for workmen's compensation insurance for those working under the Emergency Relief Administration program.

APRIL 20, 1934.

Hon. JOSEPH W. BARTLETT, *Chairman, Emergency Finance Board.*

DEAR SIR: — You have requested an opinion on the following question: —

"The city of Revere has borrowed money from the Commonwealth under St. 1933, c. 307. It is incumbent upon our Board to approve or disapprove all appropriations for enterprises not covered in the 1933 budget.

We have been asked to approve in the city of Revere an order appropriating $6,000 for industrial compensation accident insurance, said sum to be raised from the tax levy of the current year. This is to cover men working on the Emergency Relief Administration program, so called, their compensation being paid, as I understand it, by the Federal govern-

ment and the materials which they use in their work being paid for by the city of Revere.

In your opinion is an appropriation for this purpose within the legal powers of the city government of Revere?"

For your guidance in the performance of your duties I advise you that I am of the opinion that, since the Legislature has not specifically authorized payment of compensation for the results of accidents to those working under the Emergency Relief Administration program, a municipality is without authority to appropriate and pay public moneys for such a purpose.

The provisions of the Workmen's Compensation Act (G. L. [Ter. Ed.] c. 152) do not provide for payment of such compensation to anyone but an "employee." An "employee" is defined in said act as a person under a contract of hire. As I understand the situation in relation to those working under said program, no contract of hire, express or implied, exists between a municipality and one working under said program upon material paid for by such municipality, he himself receiving his pay from the Federal government. The worker is not an employee of the municipality within the meaning of G. L. (Ter. Ed.) c. 152, § 1 (4), which reads: —

"'Employee', every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable."

Hence there is no duty upon the municipality to pay the worker compensation and no authority so to do under said chapter 152 (see *Greene's Case*, 280 Mass. 506). In the absence of any enabling statute specifically providing for an appropriation and payment by a municipality for such form of compensation to this particular class of workers, I am constrained to answer your question in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Pharmacist — Certificate of Fitness — Revocation.*

Either the Board of Registration in Pharmacy or a local licensing board has the power to revoke a certificate of fitness under G. L. (Ter. Ed.) c. 138, § 30, as inserted by St. 1933, c. 376, § 2.

APRIL 25, 1934.

*Board of Registration in Pharmacy.*

GENTLEMEN: — You have requested an opinion on the following question: —

"A certain licensing board revoked the certificate of fitness of a druggist, under authority of G. L. (Ter. Ed.) c. 138, § 30, as inserted by St. 1933, c. 376, § 2. Can the Board of Registration in Pharmacy act as an appeal board and reverse that decision?"

G. L. (Ter. Ed.) c. 138, § 30, as inserted by St. 1933, c. 376, § 2, provides as follows: —

"The board of registration in pharmacy may, upon the payment of a fee of not more than five dollars by a registered pharmacist who desires to exercise the authority conferred by section twenty-nine, issue to him a certificate of fitness, which shall not be valid after one year from its date, stating that in the judgment of said board he is a proper person to be intrusted with such authority and that the public good will be promoted by the granting thereof. The board and the local licensing authorities may, after giving a hearing to the parties interested, revoke or suspend such certificate for any cause which they may deem proper, and such revocation or suspension shall revoke or suspend all authority conferred by section twenty-nine."

The effect of this section is to grant to both the Board of Registration in Pharmacy and the local licensing authorities the right to revoke a certificate of fitness granted to a pharmacist under the provisions of said section 30. This power of revocation may be exercised by either authority independently of the other. The meaning and effect of this section might perhaps have been clearer if the word "or" had been used in that section instead of the word "and." Under the decisions of the Supreme Judicial Court it has often been held that in order to give effect to the plain intent of a statute or the plain intent of parties to a written instrument the word "or" may be read as "and," and *vice versa*. *Litchfield* v. *Cudworth*, 15 Pick. 23, 27; *Central Trust Co.* v. *Howard*, 275 Mass. 153, 158. See also *Dumont* v. *United States*, 98 U. S. 142, 143, and *Manson* v. *Dayton*, 153 Fed. 258.

In my opinion, it was the intent of the Legislature to give the power of revocation to either the Board of Registration in Pharmacy or the local licensing authorities, and not to require the unanimous action of both authorities acting as a unit.

I accordingly answer your question in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Secretary of State — Delegates to a Political Convention — Vacancies.*

APRIL 26, 1934.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked my opinion, to aid you in the performance of your duties, upon a question of law relative to statutory interpretation, as follows: —

"G. L. (Ter. Ed.) c. 53, § 53, as amended by St. 1932, c. 310, § 19, provides: — 'If there is a tie vote for delegates to a convention, such vacancy shall be filled by the delegates elected from the district, except that, if no delegate is elected, or if the delegates elected fail to make a choice within ten days, the vacancy shall be filled by the state committee.'"

I am of the opinion that the words "the district" as used in the quoted statute mean the ward or town for which the delegates referred to by you were nominated, and not a senatorial district.

G. L. (Ter. Ed.) c. 53, § 54, as amended by St. 1932, c. 310, § 21, provides, in its pertinent parts, with relation to a pre-primary convention: —

"Such convention shall consist of the delegates elected at the party primary . . . The number of delegates shall be one from each *ward* and

*town* and one additional for every fifteen hundred votes, or major fraction thereof above the first fifteen hundred votes cast at the preceding biennial state election in such ward or town for the political party candidate for governor."

It is apparent from the foregoing that the district for which each delegate is nominated is either a ward or a town. When an existing political district, other than the one for which the delegates are respectively nominated, is mentioned in the said act it is specifically referred to by its accepted designation, as in the phrase in section 22 of St. 1932, c. 310, amending G. L. (Ter. Ed.) c. 53, § 53: "Delegates shall be seated in groups by senatorial districts."

St. 1932, c. 310, § 12, amending G. L. (Ter. Ed.) c. 53, § 44, provides, with relation to nomination papers such as are filed for delegates to party conventions: —

"Such papers for all other offices to be filled at a state election, and for members of committees and delegates to conventions, shall be signed by a number of voters equal in the aggregate to five voters for each ward or town in the district or county, but in no case shall more than two hundred and fifty be required."

It is to be remembered that this provision refers not only to prospective delegates but to various other prospective officers as well. If it related only to delegates it would be meaningless, on account of its reference to a "county." The language of this section is modified and made plain by G. L. (Ter. Ed.) c. 53, § 46, which deals with the certification of the nomination papers provided for by said section 44, and therein we find the meaning of the word "district" as used in said section 44 elucidated and set forth as "the district for which the nomination is made," and, as is apparent from an examination of said section 54, as amended, "the district for which the nomination is made" is either a ward or a town. Accordingly, it is plain, from a reading of the said three sections (44, 46 and 54) together, that the Legislature, by the use of the word "district" without any modifying adjective, intended to indicate, when it was employed in said chapter 310 with relation to delegates to a convention, the district for which delegates are nominated — that is, a ward or a town, as the case may be.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Insurance — Constitutional Law — Agent's Commissions.*

APRIL 30, 1934.

HON. PHILIP SHERMAN, *Chairman, House Committee on Bills in the Third Reading.*

DEAR SIR: — Your committee has addressed to me the following communication: —

"The Committee on Bills in the Third Reading of the House requests your opinion in writing as to whether or not House Bill No. 155, entitled 'An Act to provide that no agent shall be charged with a decrease or deduction from his commission or salary on industrial life insurance policies lapsed after being paid on for five years,' would, if enacted into law, be constitutional."

The text of the said act reads: —

"Chapter one hundred and seventy-five of the General Laws is hereby amended by adding after section one hundred and seventy-six the following new section: — *Section 176A.* On policies of industrial life insurance upon which premiums were paid for five years or more and surrendered to the company for a cash value or paid up insurance or extended insurance or lapsed for non-payment of premiums the agent shall not be charged with a decrease for said premium and no deduction shall be made from his commission or salary."

Assuming that this measure may be construed as relating only to policies to be written in the future, I am of the opinion that its constitutionality would be sustained by the courts.

As was said in II Op. Atty. Gen. 264, 266: —

"In the exercise of the police power conferred by the Constitution, many laws limiting the right of citizens in the making of contracts, and even prohibiting certain contracts, have been enacted by the General Court and sustained as constitutional by the Supreme Judicial Court."

The business of insurance has been held to be so charged with a public use that the Legislature may regulate it in a vast number of particulars, for the purpose of promoting the general welfare and the prevention of fraudulent and other practices tending unnecessarily to increase the burdens borne by the insuring public, under the guise of the police power, and in so doing may restrict and control the contracts made by the insurer. The exercise of such power is, of course, subject to the limitation that it must not be arbitrarily employed and must be used in a manner which bears some reasonable relation to the accomplishment of the appropriate aim of legislation, namely, the promotion of the general welfare through the proper conduct of the insurance business. Although the relation of the proposed prohibition upon the right of the insurer and its agent to enter into a certain kind of contract, in regard to limitations upon the latter's compensation for risks procured, to the promotion of the general welfare through the proper conduct of the insurance business appears remote, I cannot say that the Legislature, in determining, by the passage of the proposed measure, that there was such a relation, would be plainly acting in an arbitrary or an unreasonable fashion.

The use of the word "were" in the sixth line of the proposed measure might tend to give the impression that the Legislature intended the same to apply to compensation of agents upon policies already written, as to which the contracts, express or implied, with relation to such compensation between the agents and their companies had long before been made. If such is the intent with which the measure is enacted into law, it will be unconstitutional in so far as it relates to such pre-existing contracts. Rights acquired and vested by contracts are protected from destruction by legislation by U. S. Const. art. I, § 10, which denies to the States the power of impairing the obligation of legal contracts.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

*Department of Correction — Prison Labor — Sales.*

MAY 10, 1934.

Hon. FREDERICK J. DILLON, *Commissioner of Correction.*

DEAR SIR: — With relation to G. L. (Ter. Ed.) c. 127, § 67A (as added to the General Laws by St. 1932, c. 252), you have asked my opinion in connection with the following facts: —

"Under this act the department is desirous of ascertaining whether or not the jails and houses of correction of this State could solicit work for the caning and repairing of chairs from private families and societies. In doing this work the institution would charge for the materials and labor of repairing the articles and furniture, returning them to their owners. The statute states that 'Whoever sells or offers for sale,' and we are desirous of knowing whether or not the caning and repairing of furniture would be in conflict with this statute."

Said section 67A makes it a criminal offense to sell or offer for sale goods, wares or merchandise "manufactured, produced or mined, wholly or in part, by convicts or prisoners" except when sold at retail on the premises of the institution where they are manufactured. Transactions such as you describe, which would apparently consist only in repairing and reseating chairs already belonging to persons or societies and redelivering the same, for a consideration, would not constitute "sales," or arrangement therefor, nor "offers for sale," so as to be criminal offenses within the meaning of said section 67A.

Nevertheless, I feel that I should point out in this connection that the various sections of said G. L. (Ter. Ed.) c. 127, which deal with the labor of prisoners do not appear to make provision for, or authorize the solicitation of orders for, the performance by prisoners of the type of work to which you refer; and in the absence of specific legislative authorization it may well be doubted whether your department has any power to undertake the same.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Workmen's Compensation — Trustee — Foreign Insurance Company — Deposits.*

MAY 23, 1934.

Hon. JOSEPH A. PARKS, *Chairman, Industrial Accident Board.*

DEAR SIR: — You have requested my opinion as to the following three questions: —

"1. What is the scope of the term 'trustee' as that term is used in G. L. (Ter. Ed.) c. 152, § 62?

2. What is the character of the deposit made with the trustee under said section 62?

3. In what manner is said deposit to be held and employed by the said trustee, and what are the rights and duties of said trustee in respect to such deposit?"

G. L. (Ter. Ed.) c. 152, § 62, provides as follows: —

"Every such foreign insurance company shall, within five days after its withdrawal from the transaction of business in the commonwealth or after

the revocation of its license issued by the commissioner of insurance or of his refusal to renew it, deposit with a trustee to be named by the department an amount equal to twenty-five per cent of its obligations incurred or to be incurred under workmen's compensation policies issued to employers in the commonwealth; and within thirty days after such withdrawal, revocation of or refusal to renew a license, such company shall deposit with said trustee an amount equal to the remainder of such obligations incurred or to be incurred, the amount of which obligations shall be determined by the department. The amount so deposited shall be available for the payment of the said obligations of the company to the same extent as if the company had continued to transact business in the commonwealth, and the trustee so receiving said deposit shall pay such obligations at the times and in a manner satisfactory to the department."

Under the provisions of this section and the customary procedure as heretofore followed in such matters the Department of Industrial Accidents has directed the time and manner of disbursement of funds deposited in accordance with the provisions of said section. The "trustee" has acted solely as a depositary of the funds and disbursing agent under the direction of the department.

In my opinion, therefore, the answers to your questions are as follows: —

1. The term "trustee" as that term is used in G. L. (Ter. Ed.) c. 152, § 62, does not connote a trustee within the full legal meaning of that term, but merely a depositing and disbursing agency acting under the direction of the department.

2. The deposit made under the provisions of said section 62 constitutes a trust fund, to be disbursed by the trustee only under and in accordance with the direction of the department.

3. The deposit is to be held by the trustee and disbursed by it in accordance with the directions of the department. The trustee has no duties other than to carry out the directions of the department.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Retirement System — Public School — Punchard Academy.*

The duty of determining when a given institution first became a public school rests upon the Teachers' Retirement Board, and is to be determined as a question of fact, having regard to certain essential principles of law.

MAY 28, 1934.

Dr. PAYSON SMITH, *Chairman, Teachers' Retirement Board.*

DEAR SIR: — Your Board has asked me to inform it as to my opinion "as to the date on which the Punchard Academy first became a public school, for the purposes of the Teachers' Retirement Law."

The Attorney General does not pass upon questions of fact. The duty of coming to a determination as to the date with which you are concerned rests upon your Board alone. The principles of law which will aid you in coming to such determination are set forth in an opinion of one of my predecessors in office, VII Op. Atty. Gen. 500. In such opinion it was held that upon certain facts, then actually before the Attorney General and assumed by him to be true, the Punchard Academy, so

called, was a "public school" on August 6, 1924. At just what date the academy lost the character of a private school, which it originally possessed, and became a "public school" was not decided therein, nor do there appear to have been facts before the then Attorney General which would have enabled him to decide that point had it been relevant to the inquiry before him, nor have I such facts before me now. They are to be found by your Board.

From those facts which were before the then Attorney General in 1924, and upon which the said opinion was predicated, it may be assumed by you in making your decision that the character of a "public school," which would be sufficient to entitle its teachers to be members of the Teachers' Retirement Association, had not been acquired as a matter of law by the academy before 1902 at the earliest.

If you find that in 1902, or at some later date, for the first time the trustees of the academy exercised no more control over the administration of the affairs of the school than they were exercising in 1924, and did not thereafter increase their exercise of authority, then you will be warranted as a matter of law in deciding that at such time the academy first became a "public school" within the meaning of the Teachers' Retirement Act.

What purport to be complete records of the trustees' official actions as far back as 1913 have been shown me by counsel for the teachers. They appear to indicate that, at least since 1913, the trustees have abandoned in favor of public administration the exercise of any real power of control over the institution. If, in view of any other circumstances which may become known to you, you find that such was the fact, you will be justified, in accordance with the principle of law laid down in the said opinion of 1924, in deciding that in 1914 the academy became a "public school." If, upon a consideration of all the surrounding circumstances, you find that similar conditions existed in any other year subsequent to 1901, you will be justified by the same principles in deciding that in such year the school first became a "public school."

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Motor Vehicles — Registrar — Standard of Fitness — Foreign States.*

JUNE 1, 1934.

Hon. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — You have asked my opinion in effect as to whether or not it would be within the authority of the Registrar of Motor Vehicles to determine that the State of Rhode Island "prescribes and enforces standards of fitness for operators of motor vehicles substantially as high as those prescribed and enforced by this Commonwealth," as those words are used in G. L. (Ter. Ed.) c. 90, § 10, in view of the fact that in said State a road test is required of applicants for operators' licenses, as you write, "only in those cases in which the Registrar of Motor Vehicles of Rhode Island feels that such a test is necessary in view of the inexperience or physical or mental capacity of the applicant."

You advise me that —

"It has been the opinion of the Registrar that in order to justify such a determination by him the nonresident State must require *all* appli-

cants for operators' licenses to submit to an examination, including a road test."

I assume that the said opinion of the Registrar has been formed, in part at least, because in this Commonwealth a satisfactory road test is required as evidence of fitness of applicants for licenses to operate motor vehicles.

I cannot say as a matter of law that the Registrar has not properly exercised the authority vested in him in arriving at this opinion.

The Legislature has laid upon him alone the duty to determine whether in any given instance the standards of fitness for operators, as prescribed and enforced in another State, are "substantially as high" as those in this Commonwealth. Such determination is a decision upon a question of fact. In the absence of manifest absurdity or error in the conclusion to which the Registrar comes, which does not appear in his instant opinion, and in the absence, as here, of any suggestion of arbitrariness or lack of good faith, the soundness of the opinion or determination of fact at which, in the exercise of his discretion and judgment, he has arrived cannot properly be impugned by the Attorney General.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Department of Education — School Nurses — Qualifications.*

JUNE 15, 1934.

DR. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion as to whether your department may "establish certain standards of professional training and other qualifications which school nurses must possess in order to be eligible for appointment in those towns that receive aid under the provisions of part II of chapter 70 of the General Laws."

G. L. (Ter. Ed.) c. 70, § 17, provides: —

"No town shall receive any payment under Part II of this chapter, unless it has complied, to the satisfaction of the department of education, with all laws relating to the public schools."

G. L. (Ter. Ed.) c. 71, § 53, provides: —

"The school committee shall appoint one or more school physicians and nurses, shall assign them to the public schools within its jurisdiction, shall provide them with all proper facilities for the performance of their duties and shall assign one or more physicians to the examination of children who apply for health certificates required by section eighty-seven of chapter one hundred and forty-nine, but in cities where the medical inspection hereinafter prescribed is substantially provided by the board of health, said board shall appoint and assign the school physicians and nurses. The department may exempt towns having a valuation of less than one million dollars from so much of this section as relates to school nurses."

The duty of appointing school nurses has been placed by the Legislature upon the school committees or the boards of health, and they are entitled to exercise their discretion and sound judgment in selecting such nurses. The opinion of your department is not to be substituted for, or made controlling of, the discretion and judgment of the local authorities. Your department has no authority to make rules or regulations upon the

subject of the selection or appointment of school nurses nor to establish standards of eligibility for such nurses which are to govern the local officials in the discharge of their duty.

It is true, however, that under said G. L. (Ter. Ed.) c. 70, § 17, your department must be satisfied that the local officials have complied with the provisions of said chapter 71, section 53, before the town in which such officials function may receive payments mentioned in said chapter 70, Part II. An appointment by local officials to the position of school nurse of a person so lacking in qualifications that she could not fairly be said to be a "nurse" in any reasonable sense of that word, having regard to the usual characteristics of training and experience which are ordinarily denoted by such word, might well be held in a particular instance by your department not to be such an appointment as constituted a satisfactory compliance with the law in this respect, and so might furnish a proper reason for withholding payments under said section 17. Your department may not properly hold that there has been no compliance with the law in this regard, satisfactory to it, merely because of a difference of opinion with local authorities as to the qualifications of an appointee, but can do so correctly only when the appointment falls so far short of adequacy that no reasonable person, knowing all the facts of which the department may be aware, could say that there had been a bona fide fulfillment of the intent of the Legislature in providing that school children should have the benefit of the services of "nurses" — that is, nurses in fact not merely in name.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Department of Education — Training of the Blind — Advanced Instruction.*

JULY 2, 1934.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have requested my opinion as to the authority of the Department of Education to continue as pupils in the Perkins Institution young men and women who are taking courses outside the school, some more advanced than those offered at the Perkins Institution, when these pupils have been sent to such institution by your department, under and in accordance with G. L. (Ter. Ed.) c. 69, § 26.

The pertinent statute, G. L. (Ter. Ed.) c. 69, §§ 26 and 27, provides as follows: —

"SECTION 26. The department may, upon the request of the parents or guardians and with the approval of the governor, send such deaf and such blind persons as it considers proper subjects for education, for a term not exceeding ten years, to the American School, at Hartford, for the Deaf, in the state of Connecticut, to the Clarke School for the Deaf at Northampton, to the Horace Mann School at Boston, to any other school for the deaf in the commonwealth, as the parents or guardians may prefer, or to the Perkins Institution and Massachusetts School for the Blind, as the case may be, and, upon like request and with like approval, it may continue for a longer term the instruction of meritorious pupils recommended by the principal or other chief officer of the school which they attend. With the approval of the governor the department may, at the expense of the commonwealth, make such provision for the care and education of children who are both deaf and blind as it may deem expedient. No such pupil

shall be withdrawn from such institutions or schools except with the consent of the authorities thereof or of the department; and the expenses of the instruction and support of such pupils therein, actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be paid by the commonwealth; but the parents or guardians of such children, who are able wholly or in part to provide for their support and care, to the extent of their ability may be required by the department to reimburse the commonwealth therefor.

SECTION 27. The department shall direct and supervise the education of all such pupils, and the commissioner shall state in his annual report their number, the cost of their instruction and support, the manner in which the money appropriated by the commonwealth therefor has been expended, to what extent reimbursed, and such other information as he deems important."

It is my opinion that "upon the request of the parents or guardians" of minors who are blind, and with the approval of the Governor, your department may send such persons to the Perkins Institution, and, in accordance with section 27, the department "shall direct and supervise the education of all such pupils." It may be that the Perkins Institution does not offer courses of instruction appropriate or sufficiently advanced for the needs of certain of these pupils. In such cases I deem it within the power of your department, in the exercise of its discretion, to allow pupils who have been so sent to and are living at the Perkins Institution, and who are under the guidance and control of its principal and instructors, to take courses in other institutions of learning.

Such discretion, however, must be exercised reasonably. The legislative intent was, I believe, to provide for care, supervision and education of the blind at an institution particularly adapted for such purpose. The statutes do not contemplate that the Perkins Institution and Massachusetts School for the Blind be made a mere conduit through which pupils may be sent for education to other schools and universities at the expense of the Commonwealth, but the statutes do not limit or circumscribe the courses of instruction which may be given to blind pupils. It follows, therefore, that if the control, care and superintendence of the pupils are actually given by your department to the Perkins Institution, and the instruction at other institutions is merely supplemental to that given at said institution, and your department also performs its duty of supervising and directing the education of such pupils, the legislative intent embodied in the above-quoted statutes will not be violated.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Alcoholic Beverages — Refusal of License — Authority of Commission.*

The Alcoholic Beverages Control Commission has power to overrule the decisions of the local licensing authorities in relation to denying licenses under G. L. (Ter. Ed.) c. 138, § 12 or § 15, as inserted by St. 1933, c. 376, § 2, and to order a license to issue.

JULY 2, 1934.

*Alcoholic Beverages Control Commission.*

GENTLEMEN: — You state that in each of two towns a license to sell alcoholic beverages under G. L. (Ter. Ed.) c. 138, § 12 or § 15, as inserted

by St. 1933, c. 376, § 2, was denied by the local licensing authorities, and that each applicant duly appealed to the Commission in accordance with section 67 of said chapter 138, as amended; that pending the disposition of these appeals the local licensing authorities in each town have purported to grant a license (in one case conditional upon the result of the appeal) to another applicant, which license, if added to the number previously issued plus the application pending on appeal to the Commission, would make the total licenses exceed the number permissible under section 17 of said chapter 138, as amended. You request my opinion as to whether, under the circumstances, the Commission has power to overrule the decisions of the local licensing authorities, and whether, in the event of such action, the licenses subsequently granted by the local licensing authorities would have to be regarded as invalid.

By section 67 of said chapter 138, as amended, when an application has been denied by the local authorities the Commission is given full power, on appeal by the aggrieved applicant, to order the license to issue. Section 16A of said chapter 138, as amended, makes express provision for protecting such an appellant from the possibility of having the quota of licenses permissible under section 17 of said chapter 138, as amended, exhausted pending the decision of the Commission on appeal. Section 16A reads: —

"If in any city or town eighty per cent of the total number of licenses permitted to be granted under section seventeen to any class of licensee has been granted and there are applications for licenses pending before the local licensing authorities or if there are pending before the commission appeals from refusals of the local licensing authorities of such city or town to grant licenses in such class, every such applicant and every such appellant shall, for the purposes of said section, be deemed to have been granted a license until his application or appeal has been dismissed."

It appears, therefore, that the Commission has authority to order the issuance of licenses in the two appealed cases referred to, and that, if the Commission has made or makes such orders, the licenses which the local authorities purported to issue pending the appeals must be regarded as invalid.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Pharmacy — Registration of Store — Retail Drug Business.*

It was not the intention of the Legislature that stores should be registered and permitted to be advertised to the public as retail drug stores when the applicants do not in good faith intend to fill or to be prepared to fill ordinary prescriptions, and the Board of Registration in Pharmacy may deny an application for registration and the transaction of the retail drug business solely upon the ground that the applicant does not intend to have in stock the drugs for filling ordinary prescriptions.

JULY 9, 1934.

*Board of Registration in Pharmacy.*

GENTLEMEN: — You request my opinion as to whether the Board of Registration in Pharmacy has authority under G. L. (Ter. Ed.) c. 112, § 39, to deny an application to register a store for the transaction of the

retail drug business solely upon the ground that it appears that the applicant does not intend to have in stock the drugs for filling ordinary prescriptions.

Section 39 reads as follows: —

"The board shall, upon application made in such manner and form as it shall determine, register a store for the transaction of the retail drug business and issue to such person as it deems qualified to conduct such store, a permit to keep it open; but no such registration shall be made or permit issued in the case of a corporation unless it shall appear to the satisfaction of the board that the management of the drug business in such store is in the hands of a registered pharmacist. Such permit shall expire on January first following the date of its issue, and the fee therefor shall be five dollars."

Section 38 provides that no store shall be kept open or advertised or represented as transacting a retail drug business unless it is registered under section 39.

Section 37 defines "drug business," as used in sections 38 and 39, as —

"the sale, or the keeping or exposing for sale of drugs, medicines, chemicals or poisons, except as otherwise provided in section thirty-five, also the sale or the keeping or exposing for sale of opium, morphine, heroin, codeine or other narcotics, or any salt or compound thereof, or any preparation containing the same, or cocaine, alpha or beta eucaine, or any synthetic substitute therefor, or any salt or compound thereof, or any preparation containing the same, and the said term shall also mean the compounding and dispensing of physicians' prescriptions."

Although the construction of section 37 is perhaps not free from doubt yet, in my opinion, it was not the intention of the Legislature that stores should be registered and permitted to be advertised to the public as retail drug stores when the applicants do not in good faith intend to fill or to be prepared to fill ordinary prescriptions. The filling of prescriptions is certainly regarded by the public as an important, if not the chief, element in the transaction of "the retail drug business." An additional reason for giving the term "retail drug store" a somewhat restricted meaning is to be found in the fact that special and important privileges relating to the sale of intoxicating liquors have been granted by the Legislature to retail druggists. See G. L. (Ter. Ed.) c. 138, § 29 *et seq.*, as added by St. 1933, c. 376, § 2. The construction of G. L. (Ter. Ed.) c. 112, § 37, applied to section 39, as involving the compounding and dispensing of physicians' prescriptions as an essential element, is confirmed by an examination of the legislative documents relating to the enactment of said sections. St. 1913, c. 705. The last part of the definition, now contained in section 37, as presented in House Bill No. 2356 of 1913, read: "any preparation containing the same, or the compounding and dispensing of physicians' prescriptions." The word "or" was stricken out and the words "and the said terms shall also mean the compounding and dispensing of physicians' prescriptions," as appearing in the final enactment, were substituted.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

*Pilot Commissioners — Incoming Steamers — Port of Boston — Port of Lynn.*

The Port of Lynn is a separate port from the Port of Boston, within the meaning of G. L. (Ter Ed.) c. 103, § 25.

A vessel coming from a foreign port, bound for Lynn, which arrives first at Boston and then proceeds to Lynn, is subject to compulsory pilotage, under said section 25, while so proceeding from Boston to Lynn.

JULY 30, 1934.

*Commissioners of Pilots, Port of Boston.*

GENTLEMEN: — You have requested my opinion as to whether steamers arriving in Boston from a foreign port, which discharge part of their cargo in Boston and then proceed to the Port of Lynn for discharge of the remainder of their cargo, are subject to a charge for pilotage from the sea to Boston, and to a similar charge for pilotage from Boston to Lynn and from Lynn to sea.

The answer to your question depends upon a determination of whether or not the Port of Lynn is a separate and distinct port from the Port of Boston; for vessels, even on the completion of a voyage from a port out of the Commonwealth, would be exempt from pilotage from Boston to Lynn unless the ports of such places were separate and distinct. I am of the opinion that it is a separate port, within the meaning of the applicable statutory enactment, G. L. (Ter. Ed.) c. 103, § 25, which reads: —

"Every pilot shall take charge, within the limits of his commission, of any vessels, not exempt from compulsory pilotage by section twenty-eight, and of vessels not bound from one port to another within the commonwealth, unless they are in the completion of a voyage from a port out of the commonwealth."

In my opinion, a vessel coming from a foreign port, bound for Lynn, which arrives first at Boston and then proceeds to Lynn, under the circumstances above described, is, during this latter part of its trip, completing a voyage from a port out of the Commonwealth, within the meaning of said section 25. Such a vessel, during the last stage of its trip, is subject to compulsory pilotage, under said section 25, since she is bound from one port to another within the Commonwealth "in the completion of a voyage from a port out of the commonwealth," and apparently is not within any exemption contained in section 28 of said chapter 103. In proceeding from Boston to Lynn a vessel, under the described conditions, has not merely shifted her berth within a single port. What constitutes the Port of Boston is not determined by the boundaries set up in said chapter 103, section 1, for what is called therein "District One," which includes the "Harbor of Boston" and other places therein noted which are not necessarily within the "Port of Boston" or within the "Harbor of Boston," is not the same thing as the "Port of Boston," nor is the meaning of the term "Port of Boston" extended in its relation to the provisions of said section 25 thereby, nor altered by Federal designations of "Boston Harbor" as that term is used in various of such designations for different purposes. The Port of Lynn lacks various characteristics which exist in connection with those ports, such as Weymouth, Dorchester, Cambridge and Charlestown, which were referred to by the Supreme Judicial Court, in 1845, in the decision of *Martin* v.

*Hilton*, 9 Met. 371, and which were therein said to be within the general designation of Port or Harbor of Boston.

The rates of pilotage for the Port of Boston are specified in section 31 of said chapter 103. In section 3 of said chapter the rates for the entire pilotage district known as "District One" are established on the same basis as those set up in said section 31 for the Port of Boston, but no inference can properly be drawn from this legislative enactment that the Port of Boston is itself commensurate with said "District One" as such district is described in detail in said section 1 of chapter 103.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Minimum Wage Commission — Commissioner of Labor and Industries — Decree — Order.*

AUG. 27, 1934.

Miss MARY E. MEEHAN, *Acting Commissioner of Labor and Industries.*

DEAR MADAM: — You request my opinion as to whether, after the effective date of St. 1934, c. 308, the Commissioner of Labor and Industries will have power to enforce as a "directory order" or "mandatory order" under said chapter a decree previously made by the Minimum Wage Commission under G. L. (Ter. Ed.) c. 151; and/or whether the Minimum Wage Commission will continue to have the same power which it now has to enforce such a decree.

G. L. (Ter. Ed.) c. 151, as it now exists, provides that the Board of Conciliation and Arbitration (the Associate Commissioners of the Department of Labor and Industries, G. L. [Ter. Ed.] c. 23, § 7) in performing the duties required by said chapter shall be known as the Minimum Wage Commission (section 1); that upon final approval by the Commission, after public hearing, of the determination of a minimum wage for female employees in a given occupation by a Minimum Wage Board (as constituted under said chapter) the Commission shall enter a "decree" of its findings, and that the Commission may thereafter publish the names of employers who it finds are refusing to follow its recommendations (sections 4, 11).

Section 1 of St. 1934, c. 308, provides: —

"The General Laws are hereby amended by striking out chapter one hundred and fifty-one, as amended, and inserting in place thereof the following new chapter: —

. . . . . ."

Under this new act, if the "commission," defined as the Associate Commissioners of the Department of Labor and Industries, accepts a report of a wage board (constituted as provided in section 4) upon the establishment of minimum fair wage rates for women and minors in an occupation, and, after public hearing, approves it, the Commission shall transmit the report to the Commissioner of Labor and Industries, who shall make a "directory order" which shall define the minimum wage (section 10). If the Commissioner believes that any employer is not observing "the provisions of any order made by the commissioner under section 10" — that is, a "directory order" — he may summon such employer to show cause why his name should not be published as having failed to observe the provisions of such order, and, after hearing, the "commissioner" may publish the name of such employer (section 12). After a directory order has been

in effect nine months the Commissioner may, if he finds persistent violation, after hearing make such order "mandatory" (section 13). Any employer paying less than the minimum wage under a "mandatory order" shall be punished by fine or imprisonment (section 22).

Section 3 of said chapter 308 reads, in part, as follows: —

"This act shall not be construed to abrogate or invalidate any proceedings hitherto taken or pending on its effective date under chapter one hundred and fifty-one of the General Laws, as in effect immediately prior to such date, or to alter or modify the effect of any decree or order made under the provisions of said chapter as so in effect, but all such proceedings may be completed in accordance with said chapter, and such decrees and orders shall continue to be in full force and effect until expressly amended, modified or revoked in accordance with chapter one hundred and fifty-one as revised by this act; . . ."

In answer to your questions it is my opinion that —

1. The Commissioner has no power under section 12 of said chapter 308 to enforce a "decree" of the Minimum Wage Commission, because that section expressly confines his power of enforcement to "any order made by the commissioner under section 10," and the decrees of the Minimum Wage Commission are not made under section 10.

2. Nor has the Commissioner power under section 13 to make a "decree" of the Minimum Wage Commission "mandatory." The power under section 13 to make an order mandatory applies, by the express terms of section 13, only to directory orders; and directory orders are defined (section 1) as orders the nonobservance of which may be published "as provided in section 12," which, as before stated, applies only to orders made "by the commissioner under section 10."

3. The Minimum Wage Commission will continue to have the same power to enforce decrees heretofore made that it formerly had, until directory orders affecting the same subject matter have been made by the Commissioner after a report by a wage board appointed under said chapter 308. Section 3 of chapter 308 incorporates by reference, and so perpetuates as to existing decrees, the provisions of the existing chapter 151 of the General Laws. It expressly permits the completion of pending proceedings "in accordance with said chapter" — that is, chapter 151 before the revision; also, by providing in the same connection that the decrees made under said chapter shall continue in full force and effect until amended, modified or revoked under chapter 308, the statute discloses a clear intent that the Minimum Wage Commission shall continue to have the same power that it now has to enforce such decrees.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Commissioner of Conservation — Arbitration — Easement.*

SEPT. 14, 1934.

HON. SAMUEL A. YORK, *Commissioner of Conservation.*

DEAR SIR: — You state that the Director of the Division of Fisheries and Game has been requested in a certain case to appoint an arbitrator under section 46 of G. L. (Ter. Ed.) c. 131, and you ask my opinion as to whether a proceeding under that section is necessary.

Said section 46 reads as follows: —

"A pond other than a great pond, bounded in part by land belonging to the commonwealth or to a county, city or town, shall become the exclusive property of the other proprietors as to the fisheries therein only upon payment to the state treasurer, or to the county, city or town treasurer, as the case may be, of a just compensation for their respective rights therein, to be determined by three arbitrators, of whom one shall be appointed by the director, one shall be an individual riparian proprietor of said pond or an officer of a corporation which is such proprietor, and one shall be the chairman of the county commissioners of the county where the pond, or the largest part of the area thereof, is situated, if the riparian proprietors include the commonwealth, or one or more counties, or two or more cities or towns, or one or more cities and one or more towns, or the mayor or chairman of the board of selectmen, respectively, if only one city or town is such part proprietor."

Section 44 of said chapter provides: —

"Except as provided in the following section and in section fifty-one, the riparian proprietors of any pond, other than a great pond, and the proprietors of any pond or parts of a pond created by artificial flowing, shall have exclusive control of the fisheries therein."

You state that the pond in question is not a great pond, and that the fee in all the land bounding it is held by the corporation making the request for arbitration, although a part of such land is used as a county road and is subject to an easement of the county so to use it, the fee being in the corporation referred to. The question is whether such easement makes the road "land belonging to . . . a county," within the meaning of said section 46.

In my opinion, this question must be answered in the negative. The only right of the county is an easement to use the land in question as a road. The easement has no connection with fishing rights, and does not make the county one of the "proprietors as to the fisheries," within the meaning of sections 46 and 44. The "land" cannot properly be described as "belonging . . . to a county," within the meaning of these words as used in section 46, and therefore no arbitration under said section is proper or necessary.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Department of Public Works — Canal — Easement — Nuisance.*

SEPT. 20, 1934.

Hon. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — My opinion has been requested as to the following matter: —

"I am enclosing copies of reports . . . [of engineers] relating to an old canal owned by the Cummington Power Company, within the State highway location in the town of Cummington, which is falling in in places and creating a dangerous condition.

I am requesting your advice as to what this department should do in the matter."

In *Commonwealth* v. *Surridge,* 265 Mass. 425, 427, it is stated: —

"By the location of a highway an easement of passage is secured for the public with all incidental privileges thereby implied. The fee of the land commonly remains in the owner, who may make any use of it not inconsistent with the paramount right of the public. The easement of passage for the public acquired by the layout of a highway includes reasonable means of transportation for persons and commodities and of transmission of intelligence. Whatever interferes with the exercise of this easement is a nuisance, even though no inconvenience or delay to public travel actually takes place."

In my opinion, the canal interferes with the exercise of the easement of passage secured for the public under the layout order of the Massachusetts Highway Commission and has become a nuisance.

I advise you as follows: —

1. That there is no duty on the part of the Department of Public Works to repair or maintain the canal, or any part thereof.

2. That upon a proper application by the Cummington Power Company the department may grant a permit to make the required opening in the State highway so as to enable that company to make repairs on the canal and thereafter to maintain it upon such terms and conditions as may be deemed to be in the best interests of the Commonwealth. See G. L. (Ter. Ed.) c. 81, § 21.

3. That the department may request the Attorney General to institute appropriate proceedings to abate the nuisance created by the canal.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Department of Public Health — Local Boards — Frozen Desserts — License.*

SEPT. 26, 1934.

Dr. HENRY D. CHADWICK, *Commissioner of Public Health.*

DEAR SIR: — You call my attention to St. 1934, c. 373, entitled "An Act further regulating the manufacture and sale of frozen desserts and ice cream mix," which act went into effect on June 29th; and in connection therewith you request my opinion on the following questions: —

"1. Can a local board of health issue a license for the manufacture of frozen desserts to any person in such business on June 29th for the period between June 29, 1934, and March 1, 1935?

2. Can local boards of health, after March 1, 1935, issue licenses for periods of less than twelve calendar months but expiring on the March 1st following the date of application?

3. Must the permits granted by this department to extra-state manufacturers expire on March 1st?

4. If the answer to question 3 is in the affirmative, can the Department issue permits for any period between June 29, 1934, and March 1, 1935?"

G. L. (Ter. Ed.) c. 94, § 65H, as inserted by section 1 of said chapter 373, provides that every person manufacturing within the Commonwealth frozen desserts and ice cream mix "shall, during the month of February in each year, file with the board of health of each town" in which he proposes to manufacture "an application for a license" to manufacture such products "for the year commencing with the following March first"; and

that any manufacturer without the Commonwealth who desires to sell his product within the Commonwealth "shall apply to the department [of public health]" for "a permit to sell," and that the department may issue such a permit if satisfied, after inspection, that the plant is maintained in accordance with its rules and regulations.

The fact that these provisions state that manufacturers within the Commonwealth shall apply in February of each year for a license to manufacture frozen desserts and ice cream mix for the year commencing the following March first, and the fact that the law itself did not become effective until after February first of this current year, namely, on June 29th, — thereby obviously disenabling all possibility of applications by manufacturers during February and the issuance by local boards of licenses for the year commencing March 1, 1934, — apparently are the occasions of your first and second inquiries as to whether local boards of health have power to license such manufacturers prior to March 1, 1935.

If it is to be assumed that manufacturers may not now be licensed, merely for the reason that the annual date for application and for issuance of licenses has already elapsed, it follows that, in the year 1935 and in all subsequent years, boards may not license any manufacturer who does not apply during the month of February and who may chance to apply at some time during any year after the month of February has expired.

By such construction no manufacturer of frozen desserts and ice cream mix, if in any February he was not established in such business, or if he had not then even purposed to become so established at some time during the year, could be licensed to engage in the business until March first of the following year. This construction would deprive the individual of liberty to establish himself at any time in this legitimate enterprise, even though he might be complying with every last rule and regulation for the production and sale of frozen desserts and ice cream mix.

The main intent of the Legislature in enacting the entire law was to protect the health of the people. The fixation of the date for application and for issuance of license — since such date in no way appears to have any conceivable relationship to public health — was incident to the solicitude of the Legislature to facilitate its chief objective, in stating an orderly and uniform mode whereby health agencies might more efficaciously exercise those responsibilities imposed upon them by the law with respect to manufacturers.

If it be assumed that recitation of the month of February for application and of March first for issuance of licenses is bar to power of local boards to license manufacturers now, and enforces such boards to wait until March next so to do, it follows that the adoption of the emergency preamble, which effected operation of the law almost instantaneously rather than after the expiration of the usual ninety days, must be held of slight significance, since, upon such assumption, with respect to licensing manufacturers it expedited nothing.

By such construction, although the adoption of the preamble may be found consistent with legislative intent for immediate operation of the law in its new provisions relating generally to frozen desserts and ice cream mix, and other products, such as, among others, their ingredients, the purposed efficacy of the law is peremptorily suspended, since it is manifest that the means, which the Legislature indisputably set up to accomplish its chief object by enactment of the new provisions, — namely, function by local boards of health to license manufacturers, — is postponed.

Section 65I provides that a local board of health, if satisfied after inspection of the plant referred to "in an application for a license," may "grant to any suitable applicant therefor a license"; and that no person shall manufacture within the Commonwealth "without a license," and that no person manufacturing without the Commonwealth shall sell within the Commonwealth "without a permit."

Although the "license," to which this provision refers and without which manufacturers of frozen desserts and ice cream mix are forbidden to engage in business, is a license issuable in the manner provided in section 65H, the intent of the Legislature to safeguard the health of the people by forbidding engagement in such business without license is unmistakable; and the adoption of the preamble, for enablement of instantaneous consummation of such intent, further emphasizes incredulity that the Legislature sanctioned no action by local boards until eight months after.

In my opinion, the provision in section 65H referring to the filing of applications in February of each year is not to be construed as depriving the local boards of health of power or authority under section 65I to issue licenses upon applications filed at some other time; and, accordingly, I answer your first two questions in the affirmative.

I answer your third question in the affirmative. Obviously, all licenses of manufacturers within the Commonwealth expire March first. If manufacturers without the Commonwealth may apply for permits and receive them, and if such permits may have force throughout the year from the date of issuance, obviously, also, there is plain discrimination against local manufacturers.

Although the provisions for requirement of a permit for manufacturers without the Commonwealth appear in a paragraph separate from the provisions requiring license of manufacturers within the Commonwealth, and although the former omit to state any particular date for obtaining such a permit and the latter do, yet it does not appear that such omission in the former was intended to give the Department of Public Health greater latitude in receiving applications from and in granting permits to manufacturers without the Commonwealth than it afforded to local boards of health in receiving applications from and in granting licenses to manufacturers within the Commonwealth. The provisions relating to permits expressly recite that "such permit shall be in lieu of the license referred to in the first paragraph." Since such local manufacturers have no privilege to engage in business after March first without a license, it is inconceivable that the Legislature intended extension of a privilege to manufacturers without the Commonwealth which it would deny to manufacturers within the Commonwealth, but that, by the use of the words "in lieu of," it intended enjoyment of privileges under a permit to be identical with those enjoyed under a license, and designed equality to all manufacturers, both within and without the Commonwealth.

I answer your fourth question in the affirmative, to the effect that the department may issue permits beginning at any date in 1934, and terminating March 1, 1935.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Commissioner of Banks — Trust Companies — Statutes.*

SEPT. 28, 1934.

Hon. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — You have asked my opinion upon the following question: —

"In view of the amendment to section 18 of G. L. (Ter. Ed.) c. 172, by St. 1934, c. 349, § 12, effective June 29, 1934, may the minimum capital stock of a trust company, required by said section 18, still consist, in whole or in part, of preferred stock authorized and issued pursuant to section 6 of St. 1933, c. 112, as amended, so long as said chapter remains in force and effect?"

I answer your question in the affirmative.

It is a generally recognized rule of statutory interpretation that a general act will not be taken to repeal a special act in so far as the latter deals with specific matters touched upon by the former. Only when it appears that the acts cannot be construed in such a way as will not make them mutually inconsistent is there an exception to such rule.

St. 1933, c. 112, as amended by St. 1934, c. 3, is a special act. St. 1934, c. 349, is a general act. The former is specifically applicable to such trust companies as require reorganization and other changes, under its provisions, during the life of the act, which was definitely limited to two years. There is no necessary inconsistency in the application of the former to the special class of trust companies to which it specifically relates, during the two years of its life, and the enforcement of the latter, the general act, as to those trust companies which were not in need of the assistance provided by the former act, during the two years of its life.

There is no explicit repeal of the earlier statute contained in the later one, nor is a statute "to be deemed to supersede a prior statute in whole or in part in the absence of express words or clear implication." *Inspector of Buildings* v. *General Outdoor Advertising Co., Inc.*, 264 Mass. 85, 89. I do not regard the acts as necessarily inconsistent, when construed as I have suggested they should be. I cannot say that one has worked the repeal of the other. I am confirmed in my view that it was not the intent of the Legislature that there should be a repeal by implication by the fact that I am advised that reorganization of those trust companies which were the special object of the remedial legislation of the earlier statute was for the most part begun prior to the enactment of the later statute, something of which the Legislature must have been well aware, and with the working out of which reorganizations, under the scheme set up in the earlier statute, the General Court cannot be thought to have intended to interfere when it passed the general law (St. 1934, c. 349) in June of 1934.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Division on the Necessaries of Life — Director — Department of Public Utilities.*

The Director of the Division on the Necessaries of Life has no authority to sit jointly or concurrently with the Department of Public Utilities for the purpose of passing upon contracts relating to the sale and purchase of gas.

Oct. 8, 1934.

Miss Mary E. Meehan, *Acting Commissioner of Labor and Industries.*

Dear Madam: — You have laid before me a letter addressed to the Director of the Division on the Necessaries of Life of the Department of Labor and Industries, in which he is asked, by a party interested, to "sit with the Utility Commissioners in the hearing of the cases" — that is, cases before the Department of Public Utilities relating to various contracts for the production and distribution of gas by different companies — "with concurrent jurisdiction conferred by the Acts of 1930 (chapter 410) creating your Division." You ask my opinion as to the authority of the Department of Labor and Industries, under said chapter 410, to investigate gas prices by the said Director through his sitting jointly or concurrently with the Department of Public Utilities in the said hearing.

I am of the opinion that the Director of the Division on the Necessaries of Life has no authority to sit jointly or concurrently with the Department of Public Utilities for the purpose of hearing and passing upon contracts for the sale and purchase of gas, as to which the Department of Public Utilities has been given jurisdiction by the statutes. The said Director is not empowered so to sit, under any statute.

Long prior to the creation of the Commission on the Necessaries of Life (Gen. St. 1919, c. 341) the Legislature had delegated to the Board of Gas and Electric Light Commissioners, now the Department of Public Utilities, the supervision of gas companies and the control of prices of gas (R. L. c. 121, §§ 5, 35; G. L. [Ter. Ed.] c. 164, §§ 76, 94, 94A). It is perfectly clear that, in creating the Commission on the Necessaries of Life, now a division of the Department of Labor and Industries, and in delegating to the Director of said Division, by St. 1930, c. 410, now G. L. (Ter. Ed.) c. 23, the power to "study and investigate the circumstances affecting the prices of fuel," the Legislature did not intend to delegate to him a jurisdiction to be exercised jointly or concurrently with the Department of Public Utilities in hearing and determining cases concerning the approval of contracts for the production and distribution of gas.

I am therefore constrained to advise you that the Director has no authority to act as requested.

Very truly yours,
Joseph E. Warner, *Attorney General.*

*Commissioner of Agriculture — Milk Dealers — Bonds and Securities.*

Oct. 8, 1934.

Dr. Arthur W. Gilbert, *Commissioner of Agriculture.*

Dear Sir: — You have requested my opinion upon the following questions: —

"1. Shall all bonds or other security given by any milk dealer to satisfy the requirements of G. L. (Ter. Ed.) c. 94, as amended by St. 1933, c. 338, be deposited by the Commissioner with the State Treasurer?

2. Will the provisions of sections 42A, 42B and 42C of G. L. (Ter. Ed.) c. 94, as inserted by St. 1933, c. 338, § 2, be satisfied by legally setting off by a bank and holding in the bank bonds or deposits of a milk dealer, in an amount adequate to protect Massachusetts producers of milk, when such bonds or other security set off and held by the bank are satisfactory to the Commissioner of Agriculture?"

1. I answer your first question in the affirmative, except as it may apply to the bond with surety given under the provisions of section 42A of G. L. (Ter. Ed.) c. 94, as inserted by St. 1933, c. 338, which bond is described in section 42B of said chapter 94, as amended.

Said section 42B describes specifically what forms of security given to the Commissioner for the purpose of obtaining a license under said section 42A must be deposited by the Commissioner of Agriculture with the State Treasurer, in the following language: —

"Any cash or collateral deposited under this section or under section forty-two D shall be deposited by the commissioner with the state treasurer, . . ."

The said bond with surety is an original undertaking and does not fall within the meaning of "collateral deposited," as these words are used in the quoted sentence. These words as so used refer to stocks, bonds or personal property given to the Commissioner to secure payment of any note given to him under the provisions of said section 42B in lieu of the said bond with surety, or given in addition to any other security, under the provisions of section 42D.

2. I answer your second question in the negative. The provisions of said sections 42A, 42B and 42C with respect to the securities which the Commissioner is authorized to accept all indicate that such securities must be such as are capable of being deposited with him in the first instance, and that they must be so deposited. "Collateral," after its initial receipt by the Commissioner, must then be deposited by him with the State Treasurer, under the provisions of said section 42B. Your second question presupposes a situation where securities and collateral are allocated or physically set apart for the purpose of making good, if necessary, the owner's obligations under G. L. (Ter. Ed.) c. 94, but are not deposited with the Commissioner in the first instance nor capable of deposit by him with the State Treasurer thereafter. So remote a control of securities by the Commissioner was not within the contemplation of the Legislature in enacting the applicable statute.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*State Election — Ballot — Candidate — Withdrawal.*

G. L. (Ter. Ed.) c. 53, § 13, is not to be construed as applying to a person not nominated by a political party, and such a person may have his name omitted from the ballot for the State election at his request.

OCT. 10, 1934.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You state that Irma Rich, a candidate nominated for the office of State Auditor, has presented her withdrawal; and you re-

quest my opinion as to whether, in view of the provisions of G. L. (Ter. Ed.) c. 53, § 13, you are authorized to leave her name off the ballot for the State election.

Said section 13, so far as material, reads as follows: —

"A person nominated as a candidate for any state, city or town office may withdraw his name from nomination by a request signed and duly acknowledged by him, and filed with the officer with whom the nomination was filed, within the time prescribed by section eleven for filing objections to certificates of nomination and nomination papers."

Section 11 of said chapter fixes the time for filing objections as "in the case of state offices within the seventy-two week day hours, . . . succeeding five o'clock in the afternoon of the last day fixed for filing the certificate of nomination or nomination papers to which objections are made." This time has now expired.

I understand that Irma Rich's nomination was made by nomination papers, signed by not less than one thousand voters, under the provisions of G. L. (Ter. Ed.) c. 53, § 6.

The statutory provisions referring to a time for withdrawals, now contained in said section 13, were first enacted in St. 1888, c. 436, entitled "An Act to provide for printing and distributing ballots at the public expense, and to regulate voting at state and city elections." Section 8 of that act provided that a person may cause his name to be withdrawn from nomination by request filed with the Secretary of the Commonwealth "ten days," or with a city clerk "five days," previous to the day of election, "and no name so withdrawn shall be printed upon the ballot." At that time there was no statutory provision for filling vacancies so caused. It seems clear, therefore, that the original purpose of the provision referring to a time for withdrawal was solely to avoid the printing on the ballot of the name of a candidate who did not wish to be voted for.

By St. 1893, c. 417, § 84, the reference to time of withdrawal, as to State offices, was changed to "seventy-two hours succeeding five o'clock of the last day fixed by law within which nomination papers may be filed." By section 87 of the same act provision was made for filling a vacancy in case a candidate nominated should cause his name to be "withdrawn from nomination," namely, "by the political party or other persons making the original nomination." This provision is now section 14 of G. L. (Ter. Ed.) c. 53. It would appear, therefore, that the change above noted in reference to the time for withdrawal was connected with the provision for filling vacancies, and was intended to provide time for so doing.

Neither of the two purposes of the statute (section 13 of G. L. [Ter. Ed.] c. 53) above referred to will be interfered with in permitting Irma Rich to withdraw her name. Her name, if withdrawn, will not be printed on the ballot. And also, although it may be possible theoretically that, if her withdrawal had been earlier, the thousand or more persons who signed her nomination papers might have desired to nominate some one else in her place, and might all have agreed upon one and the same substitute and been ready and able to take the steps necessary for making a substitute nomination, that is a theoretical rather than a practical possibility; and it should carry no weight against the arguments to be advanced against presenting to the electorate the name of a candidate who

does not wish to be one. I cannot see how injustice is done to any one if Irma Rich is permitted to withdraw her name; and, on the other hand, the undesirability of having on the ballot the name of a candidate who is seeking to withdraw is plain. See *Elswick* v. *Ratliff*, 166 Ky. 149; *Bordwell* v. *Williams*, 173 Cal. 283, 285.

In my opinion, therefore, section 13 of G. L. (Ter. Ed.) c. 53, considering its purpose and spirit, is not to be construed as applying to a person not nominated by a political party; and I accordingly advise you that Irma Rich's name may be omitted from the ballot.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Commissioner of Agriculture — Milk Dealers — Bonds and Securities — Licensee.*

OCT. 10, 1934.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture.*

DEAR SIR: — You have asked my opinion upon the following questions: —

"1. Does the bond or other security filed with the Commissioner of Agriculture under the provisions of section 42B of G. L. (Ter. Ed.) c. 94, as inserted by St. 1933, c. 338, § 2, give the same financial protection to producers of milk without the Commonwealth as it does to producers of milk within the Commonwealth?

2. If verified claims from producers of milk without the Commonwealth are filed with the Commissioner of Agriculture in accordance with the provisions of section 42C of said chapter 94, as amended, will it be necessary for the Commissioner to certify such amounts as due and payable from the proceeds of any bond or collateral filed with the Department of Agriculture?"

I answer both questions in the negative.

Inasmuch as the bond which is required of one buying milk or cream from producers, as a prerequisite to a license to engage in such business (G. L. [Ter. Ed.] c. 94, as amended by the addition of section 42A), is to be fixed as to its amount by a consideration of the price paid by such licensee to "*Massachusetts producers*," it is plain that the intention of the Legislature was to limit the protection of the bond to Massachusetts producers. Otherwise an absurd situation would be created whereby the amount of a bond, fixed as is the one in question by the probable amounts which will become due to Massachusetts producers only, would be subject to the claims of foreign producers as well, and, in view of the manner in which the amount was fixed, would almost inevitably be inadequate to satisfy the amounts due to both classes of producers. The same considerations would likewise be true with regard to the amount of cash or collateral deposited by the licensee to secure possible future claims under the provisions of the statute.

The applicable provisions of the statute (G. L. [Ter. Ed.] c. 94, as amended by St. 1933, c. 338, adding to it sections 42A to 42K) are as follows: —

"SECTION 42A. . . . A license shall not be issued unless the applicant shall execute and file . . . a bond or other security satisfactory to the commissioner. . . .

Section 42B. The bond required by the preceding section shall be payable to the commissioner and shall be in a sum fixed by him. Said sum shall be substantially equivalent to the total purchase price, as determined by the commissioner, of milk and cream purchased by the applicant from Massachusetts producers in the average period between payments by him to producers during the three months immediately preceding the date of application for a license, plus ten per cent of such total purchase price, or, if the applicant is not then operating any milk plant or manufactory, shall be substantially equivalent to the total purchase price, as estimated by the commissioner, of milk and cream to be so purchased in the estimated average period between payments by the applicant to producers during the period for which the license is to issue, plus ten per cent thereof. Such bond shall be in a form prescribed by the commissioner and shall be executed by the applicant for a license and by a surety company authorized to do business in this commonwealth. It shall be upon the condition that the applicant, if granted a license, shall faithfully comply with the provisions of this chapter applicable to milk plants and manufactories, shall not give any cause for the revocation of his license under section forty-two H and shall promptly pay all amounts due to producers for milk or cream sold by them to him during the license period for which the application is made. In lieu of such bond, the commissioner may accept a note of like amount payable to him, secured by a mortgage of real estate or personal property, or both, or by a deposit of cash or collateral with him. Any such mortgage, or note secured by cash or collateral, shall be upon the same condition as is herein provided for a bond. Any cash or collateral deposited under this section or under section forty-two D shall be deposited by the commissioner with the state treasurer, who shall hold the same subject to section forty-two C."

Since a statute is not to be interpreted so as to produce an absurd result or one clearly repugnant to the intent of the Legislature as indicated by the context of the statute as a whole, it is obvious that where the word "producers" occurs in sections 42B and 42C, subsequent to the words "Massachusetts producers" in the first part of said section 42B, it must be taken to be synonymous with "Massachusetts producers."

The bond and security required of the licensee were not intended to be for the benefit of foreign producers, nor to be available for the payment of their claims.

Very truly yours,
Joseph E. Warner, *Attorney General.*

*Department of Public Health — Approval of Certificate — Contamination — Shellfish.*

The Department of Public Health has authority to revoke an approval given to the certificate of a board of health of another State relative to the noncontamination of grounds outside the Commonwealth from which oysters are taken and transported.

Oct. 22, 1934.

Dr. Henry D. Chadwick, *Commissioner of Public Health.*

Dear Sir: — You have asked my opinion as to whether your department may withdraw or revoke an approval given by it to a certificate filed by a health department of another State relative to the noncontamination

of grounds outside this Commonwealth from which oysters are taken and transported into Massachusetts for consumption.

G. L. (Ter. Ed.) c. 130, § 74 (added by amendment made by St. 1933, c. 329, § 2) reads as follows: —

"SECTION 74. No person shall transport, or cause to be transported, into this commonwealth for consumption as food any shellfish taken or dug from grounds outside the commonwealth, or sell, cause to be sold, or keep, offer or expose for sale for consumption as aforesaid any shellfish so taken or dug, unless there is on file in the department of public health a certificate, approved by said department, in which the state board or department of health or other board or officer having like powers of the state, country or province where such grounds are situated states that such grounds are free from contamination, and also a certificate approved as aforesaid, in which such state board or department of health or other board or officer having like powers states that the establishment and equipment of the person shipping said shellfish into the commonwealth are in good, sanitary condition, nor unless the container of such shellfish shall at all times, while in such transportation, bear a label or tag legibly marked with the name and address of the producer and of the shipper thereof and the numbers of such certificates, and the name of the place where and the date when taken, and absence of such label or tag so marked or failure to allow such inspection shall be prima facie evidence of violation of this section; provided, that the foregoing provisions relative to transportation shall not apply to common carriers, their servants or agents. No such certificate shall be approved by the department of public health which does not meet the provisions of the laws, rules, regulations and requirements of the United States as to interstate commerce in shellfish. A list of certificates shall be filed with the supervisor. Whoever violates any provision of this section shall be punished by a fine of not less than twenty nor more than fifty dollars, or by imprisonment for not more than thirty days, or both. The provisions of this section shall be enforced by the department of public health, local boards of health and all officers qualified to serve criminal process."

It is obvious from the context of said chapter 130, as it relates to shellfish, that it was the intent of the Legislature to guard as carefully as possible against danger to the public health from shellfish taken from areas so contaminated that the oysters or clams dug therefrom were likely to spread disease when eaten by our citizens; and it is also obvious that section 74 was enacted with the same paramount intent and that it is specifically intended to prevent the importation of polluted shellfish from other States.

The mere filing of certificates by the departments of health of other States, as to the purity of the areas and the conditions under which shellfish are obtained for the market, was not said by the Legislature to be sufficient to warrant the admission of such shellfish into this Commonwealth, but the approval of your department of such certificates was required by the General Court before their acceptance. This is not the case of the grant of an irrevocable license. In view of the paramount intention of the Legislature to protect the public health of our own citizens against polluted shellfish, it is idle to think that, because the approval of your department was once given to the certificates filed by foreign boards of health, it was intended that such approval should have to stand indefinitely, irrespective of changing conditions, and that your approval should protect the introduction of shellfish likely to cause disease into Massachusetts from

sources which had become contaminated since the approval was originally given.

On the contrary, it is the duty of your department, if it believes, upon evidence sufficient in its judgment to warrant the conclusion, that foreign shellfish grounds have become contaminated or that the establishment and equipment of a foreign shipper have become unsanitary, to revoke the approvals previously given to the certificates of boards of health of other States, to notify the shipper of such revocation, and, if the latter should persist in transporting thereafter, to proceed against any offender by criminal prosecution in the courts.

Protection of our people against danger to health is the purpose of the statute under consideration, and all its terms must be construed so as to accomplish that purpose most effectively, and no narrow interpretation favorable to foreign shippers and dangerous to the health of our own citizens is warranted.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Illegal Parking — Disposition of Fines.*

OCT. 27, 1934.

GEORGE B. STEBBINS, Esq., *Clerk, Municipal Court of the West Roxbury District.*

DEAR SIR: — You have sent me the following communication: —

"Your opinion is respectfully requested as to the disposition of fines and forfeitures received by clerks of municipal and district courts, under the provisions of section 20A of G. L. (Ter. Ed.) c. 90, as added by St. 1934, c. 368, § 1.

Pursuant to St. 1934, c. 364, such fines are to be paid to the city or town where the offense is committed, on and after December 1, 1934, so that the question comes on their disposition in October and November, 1934.

It is a matter of importance to me to know whether I shall pay such fines as I may receive as above, during October and November, to the State Treasurer, as required by G. L. (Ter. Ed.) c. 90, § 34, or to the city collector of Boston, as required by G. L. (Ter. Ed.) c. 280, § 2."

The Attorney General is not required by law to advise clerks of courts with relation to the discharge of their duties, and such officials are not bound by his opinion (I Op. Atty. Gen. 595). The matter with relation to which you inquire is one as to which you must shortly act, and your actions in this respect will necessarily be so closely connected with the direct interests of the Commonwealth and its cities and towns that I am setting forth, at your request, the opinion which I hold relative to the subject matter of your inquiry.

G. L. (Ter. Ed.) c. 90, § 34, in its present form, which will remain in effect until December 1st, at which time its repeal will be worked by St. 1934, c. 364, provides: —

"The fees and fines received under the preceding sections, . . . shall be paid . . . into the treasury of the commonwealth, . . ."

Although G. L. (Ter. Ed.) c. 90, now contains section 20A, inserted therein by St. 1934, c. 368, which deals with illegal parking in certain

particulars, and is now a section "preceding" said section 34, I am of the opinion that fines paid for illegal parking are not "received" under said section 20A but are received under and by virtue of G. L. (Ter. Ed.) c. 40, §§ 21 and 22, and therefore are not governed as to their disposition by said section 34 but are governed by the terms of G. L. (Ter. Ed.) c. 280, § 2, which provides: —

". . . A fine or forfeiture imposed by a district court or trial justice shall, except as otherwise provided, be paid to the town where the crime or offence was committed. . . ."

Illegal parking is not a violation of any section of G. L. (Ter. Ed.) c. 90, for it does not appear in any part of said chapter 90 that the Legislature has regulated the parking of motor vehicles, but it may be a violation of a local ordinance adopted by a city or town under authority granted by the Legislature.

The enabling statute is G. L. (Ter. Ed.) c. 40, § 22, which provides as follows: —

"Except as otherwise provided in section eighteen of chapter ninety and subject, so far as applicable, to section two of chapter eighty-five and sections eight and nine of chapter eighty-nine, a city or town may make ordinances or by-laws, or the board of aldermen or the selectmen may make rules and orders, for the regulation of carriages and vehicles used therein, with penalties for the violation thereof not exceeding twenty dollars for each offence; and may annually receive one dollar for each license granted to a person to use any such carriage or vehicle therein. Such rules and orders shall not take effect until they have been published at least once in a newspaper published in the city, town or county."

The disposition of all penalties for the violation of ordinances, by-laws and regulations of cities and towns is specifically provided for by G. L. (Ter. Ed.) c. 40, § 21, wherein it is provided that they "may be recovered by indictment or on complaint before a district court or trial justice, *and shall enure to the town or to such uses as it may direct.*"

Nowhere does it appear in G. L. (Ter. Ed.) c. 90, § 20A, inserted by St. 1934, c. 368, expressly or by implication, that the Legislature intended to repeal so much of G. L. (Ter. Ed.) c. 40, § 21, as might apply to parking ordinances, by-laws, rules and regulations adopted by cities or towns, or by city councils or selectmen.

Nor does it appear from said G. L. (Ter. Ed.) c. 90, § 20A, that the Legislature intended itself to declare any act of parking an offense or that it intended to do anything more than to provide a convenient means whereby fines set up by the action of cities and towns, under said G. L. (Ter. Ed.) c. 40, § 22, for parking offenses created as such by them under said section might be collected. It cannot well be said that such fines are "received under the preceding sections," those of G. L. (Ter. Ed.) c. 90, prior to section 34, as the quoted words are used in said section 34.

It follows that fines and forfeitures imposed for the violation of ordinances, by-laws, rules and regulations, made or promulgated by cities and towns or city councils or selectmen, regulating the parking of motor vehicles are to be disposed of in the same manner as are fines and forfeitures imposed for violation of all other similar ordinances, by-laws, rules and regulations, namely, by payment to the city or town where the violation occurs.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Alcoholic Beverages — Municipality — Licenses.*

Nov. 9, 1934.

*Alcoholic Beverages Control Commission.*

GENTLEMEN: — You request my opinion "as to the effect of a tie vote in any city or town on the question of granting licenses for the sale of alcoholic beverages."

The vote is upon the question: "Shall licenses be granted . . . ?" G. L. (Ter. Ed.) c. 138, § 11, as inserted by St. 1933, c. 376, § 2. Said section 11 further provides: —

"If a majority of the votes cast in a city or town in answer to question one are in the affirmative, such city or town shall be taken to have authorized, for the two calendar years next succeeding, the sale in such city or town of all alcoholic beverages, subject to the provisions of this chapter."

By the terms of the statute the sale of liquor can be authorized only if a majority of the votes are in the affirmative. Accordingly, a tie vote cannot have the effect of authorizing the sale.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Trust Company — Officer — Dual Capacity.*

The Commissioner of Banks has authority, under G. L. (Ter. Ed.) c. 172, § 14, as inserted by St. 1934, c. 349, § 8, to issue a permit to an officer of a trust company to act as an officer in more than one other trust company.

Nov. 13, 1934.

Hon. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — You request my opinion as to whether, under G. L. (Ter. Ed.) c. 172, § 14, as inserted by St. 1934, c. 349, § 8, you have authority to issue a permit to an officer, director or employee of a trust company to act as an officer, director or employee in more than one other trust company or national banking association.

Said chapter 349 is entitled "An Act making certain changes in the law relating to trust companies." Section 8 of that act (amending section 14 of G. L. [Ter. Ed.] c. 172), reads, in part, as follows: —

". . . From and after January first, nineteen hundred and thirty-five, no director, officer or employee of any such corporation shall be at the same time a director, officer or employee of a corporation, other than a mutual savings bank, co-operative bank, Morris Plan Company or credit union, or a member of a partnership organized for any purpose whatsoever which makes a business of making loans secured by stock or bond collateral or shall at the same time be individually engaged in such business; provided, that nothing in this section shall prohibit a director, officer or employee *of any such corporation* from being at the same time an officer, director or employee *of another* such corporation or national banking association, if, in such case, there is in force a permit therefor issued by the commissioner, who is hereby authorized to issue such permit if, in his judgment, it is not incompatible with the public interest, and to revoke any such permit whenever he finds, after reasonable notice and opportunity to be heard, that the public interest requires its revocation. . . ."

The question is whether the word "another," as used with "such corporation [*i.e.*, a trust company] or national banking association," is to be construed as meaning one other, and only one, or as meaning any other.

The Century Dictionary states that the word "another" is "usually written *an other;* . . . The uses are simply those of *other* with *an* preceding."

To construe the statute as meaning that the Commissioner of Banks should have power to permit service in one other trust company or national bank, and only one, seems to me a very forced construction, and a construction that would not naturally occur to a person reading the statute. If the Legislature had intended to restrict the power of the Commissioner of Banks to issuing a permit for service in only one corporation, it would naturally have said "one other" instead of "another." I am constrained to advise you that your power to issue permits under said section 8 is not restricted to one other corporation.

It will be noted that this construction in no way jeopardizes the interests of the public, for an officer or employee of a trust company cannot serve in any other trust company or national bank except with the permission of the Commissioner of Banks, given after he has determined that such service is "not incompatible with the public interest," and which permission, moreover, the Commissioner of Banks can at any time revoke.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Commonwealth — Salaries — Restoration.*

The salary reductions of officers and employees of the Commonwealth, formerly provided for by statute, must be restored on December 1, 1934.

Nov. 19, 1934.

Hon. GEORGE E. MURPHY, *Commissioner and Comptroller.*

DEAR SIR: — You have asked my opinion as to whether the salary reductions of officers and employees of the Commonwealth are to be restored on December 1, 1934, in accordance with the provisions of St. 1933, c. 105, § 5. I advise you that such restoration is required by the acts of the General Court.

The intent of the legislative enactments is clear upon this point, and the mandate of the General Court is to be carried into effect by you and all other officers concerned.

The first statute which provided for a temporary reduction in the regular rate of salaries (St. 1933, c. 105) contained an emergency preamble, and it is obvious from its context that it was intended to effect such reduction only for the limited period between its enactment and the end of November, 1934. It is plain from its context that the legislative intention was to provide for the immediate payment of salaries as due at their original or unreduced basis on and after December 1, 1934.

St. 1933, c. 105, § 5, provides: —

"The reduction in salaries provided for by this act shall be effective only for the period beginning April first in the current year and ending November thirtieth, nineteen hundred and thirty-four, except that the reduction in salaries of the members of the general court shall be effective as of the first Wednesday in January of the current year and shall continue

only until the end of the legislative year of nineteen hundred and thirty-four."

No contrary intent is indicated in St. 1933, c. 296, a statute making an appropriation for certain increases in particular salaries; and St. 1934, c. 194, an emergency measure for the partial restoration of the salary reductions prior to December 1st, reiterates, by reference to the said chapter 105, the intent of the General Court, unmistakably expressed, that payment in full of salaries should be resumed December 1, 1934.

You have called my attention to G. L. (Ter. Ed.) c. 29, § 10, which reads: —

"Officers or departments having charge or supervision of expenditures in behalf of the commonwealth may continue expenditures in each year at the rate authorized by appropriations for the preceding fiscal year, until the general court makes an appropriation therefor or provides otherwise."

I assume, since you have alluded to said section 10, that the rate authorized by appropriations for salaries for the present fiscal year is not a rate sufficiently high to pay salaries at the original or unreduced rate. Even if this be the fact, the provisions of the general law in said section 10, with relation to continuing expenditures in each year at the rate authorized by appropriations for the preceding fiscal year, are to be read in connection with the later acts of 1933 and 1934, above referred to, which deal in a more minute and definite way with a particular and definite phase of the general subject treated by said section 10.

It is a general principle of statutory interpretation that under such circumstances the earlier and later statutes are to be read together and harmonized, with a view to giving effect to a consistent legislative policy, but, to the extent that there be any repugnancy between them, a later statute dealing with the common subject matter in a definite, explicit or more particular manner will prevail over an earlier general statute. If there be conflict between the earlier general law and the later and more specific and particular statute, the latter is to be treated as creating an exception to the earlier general statute.

It is plain that in enacting St. 1933, c. 105, and St. 1934, c. 194, it was the intent of the General Court that the payment of salaries at the original or unreduced rate after December 1, 1934, should have the effect of an exception to the provisions of the general law as set forth in comprehensive terms for the direction of officials by G. L. (Ter. Ed.) c. 29, § 10, and that said chapter 29, section 10, should not obstruct the paramount intent of the Legislature to restore salaries to their former amounts on and after December 1, 1934.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Registration in Medicine — Examination — Qualification — High School.*

The words "public high school" in G. L. (Ter. Ed.) c. 112, § 2, as used with relation to the qualification of an applicant for examination for registration as a qualified physician, apply only to the ordinary day high school referred to in G. L. (Ter. Ed.) c. 71, § 4, and do not apply to evening high schools as authorized by G. L. (Ter. Ed.) c. 71, § 19.

Nov. 23, 1934.

Mr. Michael Zack, *Director of Registration, Department of Civil Service and Registration.*

Dear Sir: — You have requested my opinion as to the meaning of the words "public high school" as used in G. L. (Ter. Ed.) c. 112, § 2, second sentence, and more particularly whether these words refer to a day high school solely, or whether they are equally applicable to a night high school.

The second sentence of section 2 of said chapter 112 reads: —

"Each applicant, who shall furnish the board with satisfactory proof that he is twenty-one or over and of good moral character, that he possesses the educational qualifications required for graduation from a public high school, and that he has received the degree of doctor of medicine, or its equivalent, either from a legally chartered medical school having the power to confer degrees in medicine, which gives a full four years' course of instruction of not less than thirty-six weeks in each year, or from any legally chartered medical school having such power, if such applicant was, on March tenth, nineteen hundred and seventeen, a matriculant thereof, shall, upon payment of twenty-five dollars, be examined, and, if found qualified by the board, be registered as a qualified physician and entitled to a certificate in testimony thereof, signed by the chairman and secretary."

The provisions of law regulating the establishment and maintenance of high schools are contained in G. L. (Ter. Ed.) c. 71, § 4, which reads as follows: —

"Every town containing, according to the latest census, state or national, five hundred families or householders, shall, unless specifically exempted by the department and under conditions defined by it, maintain a high school, adequately equipped, which shall be kept by a principal and such assistants as may be needed, of competent ability and good morals, who shall give instruction in such subjects as the school committee considers expedient. One or more courses of study, at least four years in length, shall be maintained in such high school and it shall be kept open for the benefit of all the inhabitants of the town for at least one hundred and eighty days, exclusive of vacations, in each school year, unless specifically exempted as to any one school year by the department because of epidemic or other emergency. Each high school maintained by a town required to belong to a superintendency union shall be conducted in accordance with standards of organization, equipment and instruction approved from time to time by the department."

The provisions of law relative to the establishment and maintenance of evening high schools are contained in G. L. (Ter. Ed.) c. 71, § 19, which reads as follows: —

"Every city of fifty thousand inhabitants shall maintain annually an evening high school, in which shall be taught such subjects as the school committee considers expedient, if fifty or more residents, fourteen years or over, competent in the opinion of the committee to pursue high school studies, shall petition in writing for an evening high school and certify that they desire to attend."

It is to be noted that the establishment of evening high schools is limited to cities of over 50,000 inhabitants, whereas day high schools must be established in every city or town having more than 500 families; and if the city or town has less than 500 families, provisions are made for the granting of the opportunity for a high school education at the public expense in schools maintained by other towns. See G. L. (Ter. Ed.) c. 71, §§ 5–10, inclusive.

It is also to be noted that section 19, above quoted, contains no restrictions or limitations relative to the nature or extent of the courses to be given at evening high schools, whereas said section 4, with relation to the other kind of high schools, provides that "one or more courses of study, at least four years in length, shall be maintained in such high school and it shall be kept open for the benefit of all the inhabitants of the town for at least one hundred and eighty days, exclusive of vacations, in each school year."

In view of the varying requirements as to evening and day high schools, as pointed out in the preceding paragraph, it is my opinion that the words "public high school" as used in G. L. (Ter. Ed.) c. 112, § 2, apply only to the ordinary day high school referred to in said G. L. (Ter. Ed.) c. 71, § 4, and do not apply to evening high schools as authorized by G. L. (Ter. Ed.) c. 71, § 19. No hardship is imposed by this construction, inasmuch as said G. L. (Ter. Ed.) c. 112, § 2, does not require graduation from a high school as a prerequisite to the taking of an examination, but merely requires that the applicant shall possess "the educational qualifications required for graduation from a public high school." If, therefore, any particular evening high school actually provides for a course of study comparable to that usually followed by a day high school, and meets the requirements as to time, set forth in G. L. (Ter. Ed.) c. 71, § 5, a student taking such course complies with the requirements of G. L. (Ter. Ed.) c. 112, § 2.

It would appear, therefore, that the previous practice of the Board, as set forth in your request, whereby the Board accepts education in a night high school only in so far as it is evaluated in terms of day high school work, is a reasonable and proper procedure for the Board to follow.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

*Department of Education — State Teachers College — Minor Child — Resident.*

A minor is not entitled to the privilege of instruction in a State Teachers College, as a resident of Massachusetts, when the parents are residents of another State.

Nov. 24, 1934.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You have asked my advice on the following matter: —

"Will you kindly advise me whether a minor child is entitled to the privilege of instruction as a resident of Massachusetts in a State Teachers College when her parents have been residents of the city of Albany, New York, since May, 1934."

In connection therewith you have advised me as to the following facts: —

"The father of a student now registered at the State Teachers College at North Adams moved from the city of Pittsfield, Massachusetts, to Albany, New York, in May, 1934. He protests the payment of the tuition fee for his daughter in the State Teachers College at North Adams on the ground that he has paid a poll tax in Pittsfield and that his legal residence is in Pittsfield until such time as he will be entitled to vote in Albany."

You inform me that the Department of Education has established a rule concerning tuition fees for nonresident students at a State Teachers College, which action has been taken, I assume, under the provisions of G. L. (Ter. Ed.) c. 73, § 6.

I answer your question in the negative.

Said G. L. (Ter. Ed.) c. 73, § 6, provides as follows: —

"Upon payment of tuition fees the department may receive students not residents of the commonwealth in state normal schools."

Ordinarily, as a matter of law, the residence of a minor child is that of the parents. The determination of just where any given person has a residence is often a matter of some difficulty. It is governed, in part, by the intention of the person in question, and that intention is itself to be determined by a consideration of various facts having in themselves some tendency to prove what that intention is. The general principle of law which is to be applied in any particular instance in determining whether a certain person is a nonresident of Massachusetts may be stated as follows: A nonresident of Massachusetts is one who makes his home at a place outside the Commonwealth, with no present intention of removing from such place. The place whereat such a person pays a poll tax might be some evidence to be considered in determining whether his intention were to make his home at the place outside Massachusetts where he now stays, or whether he is intending to remain there only temporarily and eventually to return to the Commonwealth. Such evidence would not be entitled to much weight if, as here, the poll tax were levied and became due prior to the person's removal. In any event, such a piece of evidence would not be conclusive, and, in connection with other contrary pieces of evidence which tended to show a present intent to live permanently at a place outside Massachusetts, would not of itself establish the fact of residence in this Commonwealth.

In regard to a pupil at a State Teachers College, it is for you, in the first instance, to determine under the general principles of law which I

have suggested where her place of residence is, and in doing so you will necessarily determine where the residence of her parents is, she being a minor.

You have stated in the last paragraph of your letter, with relation to such pupil, that "her parents have been residents of the city of Albany, New York, since May, 1934." If that is your determination, arrived at by a consideration of all the factors which I have indicated, your conclusion that the minor pupil was herself a nonresident of Massachusetts would not be unreasonable.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*City of Lowell — Finance Commission — Appropriation — Lowell Textile Institute.*

The city of Lowell is obliged to make an appropriation for the current fiscal year for the Lowell Textile Institute.

Nov. 28, 1934.

*Lowell Finance Commission.*

GENTLEMEN: — You have asked my opinion upon the following question of law: —

"The Finance Commission of Lowell, a State board established by St. 1931, c. 411, requests your opinion as to whether or not the city of Lowell is obliged by law to appropriate yearly the sum of $10,000 toward the maintenance of the Lowell Textile Institute, which is also a State institution."

By a long line of opinions of the Attorneys General in relation to boards and officers in like situation as your Commission, with regard to appointment and sphere of duties, it has become the settled practice of this department to give opinions to such boards and officers only upon the specific and limited line of inquiry as to questions involving a construction of statutes creating and governing such boards and officers. I doubt whether I am required to advise your Commission as to your instant inquiry; nevertheless, I prefer to express an opinion for your guidance with relation thereto, inasmuch as your inquiry is connected with the administration of the finances of the Commonwealth as a whole, and that I may beyond all question perform my full duty as an officer thereof, even as to a matter where it may well be said that I am not required by strict interpretation of the law to act.

Resolves of 1917, c. 85, is as follows: —

"*Resolved,* That there be allowed and paid out of the treasury of the commonwealth from the ordinary revenue, to the trustees of the Lowell textile school the sum of fifty thousand dollars for the maintenance of said school from July first, nineteen hundred and seventeen to June thirtieth, nineteen hundred and eighteen; the sum of sixteen thousand eight hundred and twenty-five dollars for building construction and improvements, fifteen thousand eight hundred and twenty-five dollars of which shall be used for adding a second story on Kitson hall, and the sum of one thousand dollars for school grounds, including the approaches thereto; *provided,* that no part of this sum shall be paid until satisfactory evidence has been furnished to the auditor of the commonwealth that an

additional sum of ten thousand dollars has been paid to the said trustees by the city of Lowell, or has been received by them from other sources. The city of Lowell is hereby authorized and directed to raise annually by taxation and pay to said trustees such a sum of money, not less than ten thousand dollars, as may be necessary to secure the amounts authorized by this resolve which may be expended to provide for evening instruction in the said school for residents of Lowell."

If this be read in connection with the appropriation bill of the current year, St. 1934, c. 162, § 2, item 377, which is as follows: —

"For the maintenance of the Lowell textile institute, with the approval of the commissioner of education and the trustees, a sum not exceeding one hundred fifty-three thousand eight hundred and twenty-five dollars, of which sum ten thousand dollars is to be contributed by the city of Lowell, and the city of Lowell is hereby authorized to raise by taxation the said sum of ten thousand dollars . . . $153,825.00"

it becomes plain that the Legislature of 1934, in making an appropriation for the benefit of the Lowell Textile School, enacted the accompanying authorization to the city to raise money in connection with the said appropriation in a mandatory sense similar to that which was employed in said Resolves of 1917, c. 85. The same course has been followed in appropriation bills by Legislatures beginning with 1919.

Accordingly, I answer your question to the effect that so far as this year is concerned the city of Lowell is obliged to make the appropriation designated in said St. 1934, c. 162, § 2, item 377, for the institution therein mentioned.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

*Cities and Towns — Laborers — Vacation.*

Nov. 28, 1934.

Miss MARY E. MEEHAN, *Acting Commissioner of Labor and Industries.*

DEAR MADAM: — You request my opinion as to the application, in view of certain provisions now existing, of the provisions of G. L. (Ter. Ed.) c. 41, § 111, as amended by St. 1932, c. 109, relating to vacations for municipal laborers. This section provides for "an annual vacation of not less than two weeks without loss of pay" to laborers "regularly employed" by a town.

The statute further provides: —

"A person shall be deemed to be regularly employed, within the meaning of this section, if he has actually worked for a city or town for thirty-two weeks in the aggregate during the preceding twelve months, notwithstanding that he has ceased, otherwise than by voluntary withdrawal or dismissal for cause in accordance with law, to be in the employ of such city or town."

You state that owing to the strained financial condition of some cities and towns the hours of laborers have been curtailed, so that they have not worked more than perhaps three days a week, but have so worked during more than thirty-two weeks; and you ask my opinion as to whether such laborers are entitled to the vacation of two weeks provided for by

the statute. In my opinion, they are. They have remained, as I understand it, regular employees in the labor service of the town, so far as the town has any regular labor service. The fact that the work of all laborers has been curtailed should not have the effect of depriving them of the vacation privilege provided for by the Legislature.

You also ask my opinion as to what rate of pay these laborers should receive during the two weeks' vacation period. In my opinion, it should be the amount of pay which they are receiving at the time when the vacation is declared, that is to say, the amount which they would receive if they remained at work.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

# INDEX TO OPINIONS

# RULES OF PRACTICE

## In Interstate Rendition.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney: —

(*a*) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(*b*) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(*c*) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(*d*) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(*e*) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(*f*) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(*g*) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(*h*) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(*i*) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the

requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application. The affidavit or affidavits should contain sufficient facts to make out a prima facie case of guilt, and should not be a reiteration of the form of the complaint nor contain conclusions of law.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

750. 5-'35. Order 4591.